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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1672

JOHN L. LEA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A, pages A1-A10) has not yet been officially reported.

JURISDICTION.

The decision of the Court of Appeals was rendered on February 19, 1980 (Appendix B, page A11). A timely petition for rehearing was denied on March 24, 1980 (Appendix C, page A12). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a scheme to deprive an employer of the honest and faithful services of an employee constitutes a fraud cognizable under the mail fraud statute without proof of tangible loss or injury to the employer and without proof that harm to the employer was contemplated by the employee.

2. Whether mail use that is necessary and proper in the conduct of routine and innocent business procedures carried on by legitimate businesses warrants conviction under the mail fraud statute even though the contents of the mailed material contain no falsehood or misrepresentation, the alleged victim of the fraud suffers no pecuniary loss or injury, and the precise relationship of the mailings alleged in the indictment to the scheme pronounced by the Court is not established.

3. Whether the admission in a criminal jury trial of testimony of prior "bad acts" occurring twelve years before trial under Rule 404(b) of the Federal Rules of Evidence that is acknowledged prejudicial to the defendant is justified by an alleged need to establish character, motive or intent and therefore not in conflict with Rule 403 of the Federal Evidence Rules.

STATUTES INVOLVED.

The mail fraud statute, 18 U. S. C. § 1341, provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 403, 28 U. S. C., of the *Federal Rules of Evidence* provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404, 28 U. S. C., of the *Federal Rules of Evidence* provides as follows:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE.

After verdict favorable to petitioner in civil proceedings instituted by Safeway Stores Incorporated (Safeway), the present criminal proceedings, in twenty counts, were begun for violation of 18 U. S. C. § 1341, the federal mail fraud statute. In this action, petitioner was found guilty by the jury on each count of the indictment and was sentenced to two years imprisonment on each count to run concurrently and fined the sum of $1,000.00 on each of Counts 1 through 10 for a total of $10,000. (T. 585, 594-596) The conviction was affirmed by a majority of the Court of Appeals for the Seventh Circuit.

Petitioner's Employment with Safeway:

In terms of sales volume, Safeway is the largest supermarket chain selling meat and groceries throughout the United States. With two exceptions, this company operates west of the Mississippi River and maintains over 2,000 stores. Meat products are purchased for Safeway through branch buying offices that are responsible for furnishing the stores in their geographic locale and occasionally for outlets in other areas whose buying offices are unable to fill their needs. Generally, meat is purchased in wholesale form from suppliers who transport the goods to Safeway warehouses where it is prepared for delivery to individual stores. (T. 40-43)

Petitioner was employed as manager and purchasing agent in the meat buying department of the Midwest Branch office of Safeway. During the times relevant to this litigation, the Midwest buying office was located in Chicago until May of 1971 when the office was moved to Prairie Village, a suburb of Kansas City. As purchasing agent, some of the products petitioner purchased for Safeway were ordered through Mutual

Brokerage Service Incorporated (Mutual), located in Chicago, whose stockholders and operating managers, for most of the period covered by the indictment, were William Horwich (Horwich) and Allen Petlin (Petlin). The record did not identify all suppliers dealt with by petitioner who were not represented by Mutual nor does the record identify any other broker. The indictment alleged that from 1965 to March of 1975, at Chicago, and elsewhere, petitioner received monies from Petlin and Horwich for Safeway business.

General Buying Procedures Used by Safeway and Mutual:

Safeway used an offer and acceptance method of buying. Essentially, Safeway furnished specifications to suppliers, and prospective suppliers, who were invited to make offerings to regional buying offices. These offerings were either accepted or rejected. (T. 38, 44-45) The Midwest Branch would receive numerous daily telephone offerings from various meat suppliers, and Mutual, advising as to the price, quality and availability of their products. (T. 49-50, 416-417) These offerings were taken by petitioner and various members of his staff. (T. 250-251, 413) Depending on current market prices and the needs of the various stores, meat products would be purchased through return telephone calls by petitioner or other members of his buying staff. (T. 50, 250, 253, 259, 263, 283) Subsequently, purchase orders, confirmations, invoices, brokerage statements and payment checks would be prepared and mailed. Safeway paid the suppliers directly while those suppliers whose sales had been generated by Mutual paid commissions directly to this broker. With regard to Mutual, petitioner and other members of his staff received its offerings and, if accepted, petitioner, or others, would notify Mutual. Petitioner used Mutual more than other members of his staff and more than was normally used by other branch offices of Safeway. (T. 62-64, 72-73, 251-252, 259, 263-264, 283, 285-287)

Offerings coming into the Midwest Branch were recorded by petitioner and other buyers in that office on a work sheet/offering sheet. When offerings were accepted, the supplier, or where appropriate, Mutual, would be advised by phone and given a purchase order number. (T. 49-50, 70-71, 253) Subsequently, purchase orders, in multiple copies, would be prepared and mailed by the buying office. One copy was retained by the buying office while several copies were mailed to Safeway and its various divisions. When a broker was not used by a supplier, a copy of the purchase order was mailed directly to the supplier. On sales generated by Mutual, a copy of the purchase order was mailed directly to Mutual. In all instances, the purchase orders contained the name of the supplier. (T. 37, 51-54, 290-297, 439-441)

In sales through Mutual, this broker, upon receipt of the purchase order, would prepare and mail confirmations of the sale to the supplier and the Safeway branch buying office. In all instances, suppliers prepared their own invoices. Mutual also prepared brokerage statements which were mailed to its suppliers who paid Mutual directly. Safeway paid the suppliers directly by mail.

In addition to the purchase orders, the buying office was required by the company to mail periodically to the head office a form known as MB-4. This form contained all offerings received and accepted. (T. 37, 55-56, 81, 111, 255, 257, 263, 414-416) While there was testimony indicating that Mutual "should" have been designated on both the purchase orders and MB-4's mailed by the buying office to Safeway (T. 51-52, 263), there was no evidence introduced that mandated that designation. At one period, Mutual had been designated on the purchase orders and then it was omitted. (T. 320) The Government did introduce evidence that petitioner told his clerical staff and his buying associates not to designate the broker on the forms sent to the head office. (T. 257, 415-416, 441) Neither the purchase orders nor the MB-4's contained columns for the

identification of brokers. (T. 302) Petitioner's supervisor stated that petitioner did not know that Mutual's designation was required. When told to include designation of the broker in July of 1974, thereafter Mutual was always identified. (T. 88, 115, 117) There was no written Safeway policy that brokers should be designated on purchase orders or MB-4's. (T. 279-280) Petitioner's secretary stated that she was not aware of any company policy that required the broker to be identified in those forms sent to the head office. (T. 304) When Safeway began its investigation of petitioner, all purchase orders maintained in his office and all sales confirmations sent by Mutual were properly maintained at his buying office. In any event, MB-4's and purchase orders were omitted in the indictment. (T. 116) Petitioner was discharged by Safeway on February 20, 1975. (T. 76) At all times relevant to this litigation, there was no Safeway policy that brokers should not be used. (T. 104-108, 78-280, 287-288)

Official Safeway Policies and Procedures:

Safeway's basic buying policies were:

"1. Deal fairly with all suppliers in contracting for supplies. Questionable dealings with suppliers positively will not be tolerated. Honesty and fair dealings are the only means of acquiring the confidence of those with whom the company deals.

2. See that terms of all contracts are adhered to by both the company and its suppliers.

3. Never disclose one supplier's price quotation to another supplier to obtain a lower price. Any employee indulging in this practice is subject to immediate dismissal.

4. Refrain from sharp practices and chiseling tactics.

5. Accept no gifts or favors, either directly or indirectly, from anyone doing or seeking to do business with the company. Any employee who violates this policy is subject to immediate dismissal. In addition, the company may require him to account to it for the value of whatever he receives.

6. Pay prevailing market prices for all commodities, taking into consideration the following factors: (a) grade and quality; (b) quantity purchased; (c) method of sale and delivery.
7. Strive to eliminate uneconomic methods of distribution and wherever possible purchase in full transportation units from one point of manufacture to one point of unloading." (T. 46-49)

Additionally, Safeway's policy with regard to brokers provided:

"1. The company's buying shall be conducted in such a manner as to conform with the wishes of the seller. This specifically means that, number one, if the seller elects to deal through brokers, the company shall deal through the brokers designated.
2. If the seller elects to deal directly, the company shall follow that method. Safeway, however, will never seek to deal directly with a manufacturer or seller for the purpose of eliminating the use of a broker. As a general rule, a seller who employs no broker cannot involve himself or those who buy from him in a violation of the Brokerage Section of the Robinson-Patman Act." (T. 57-60)

On October 15, 1969, petitioner signed a conflict of interest statement that provided that for a period of five years preceding his signature to this document neither he nor any member of his family received any gift or gratuity from any supplier to the company or a supplier's representative or any concern or individual doing business or seeking to do business with Safeway. On this document, petitioner acknowledged and understood that his relationship to the company was fiduciary and that he owed Safeway a continuing duty of loyalty and good faith. (T. 67-69)

Payments Allegedly Received by Petitioner from Horwich and Petlin:

Under a grant of immunity, both Petlin and Horwich testified for the Government. Both witnesses, and Mutual, had previ-

ously been dismissed as defendants in civil litigation brought against them, Mutual, and petitioner by Safeway. This civil litigation had ended prior to the commencement of the criminal trial. (T. 126, 242-246, 342-347)

At trial, Petlin and Horwich testified that Mutual was organized in July of 1964 with a number of silent partners. While they conducted the day-to-day business of this corporation, four other persons maintained interests in this business until their shares were purchased in July of 1969. (T. 118-120, 139, 305-306)

After a conversation with their associates in September of 1966, Petlin and Horwich began making cash payments to petitioner. These payments allegedly continued for the next eight years. Payments were made to petitioner in cash personally by Horwich or Petlin. (T. 128-136, 308-310) During this period, approximately $29,250 was given in cash to petitioner. During this period, Mutual earned commisions on sales to Safeway of approximately $547,000. (T. 229-230, 318, 346, 449, 465)

The first payment was given to petitioner on or about September 16, 1966. On that occasion, a Mutual check was drawn payable to one of the silent partners who in turn cashed the check. This cash, in the sum of $400, was allegedly paid personally to petitioner. (T. 134, 162) Thereafter, additional payments were made. (T. 145, 313-314) From 1967 to 1969, Mutual's accounting records identified these checks as loan checks or bonus checks. (T. 143-144, 311) This designation was used to identify the purpose of the payment to the other partners. No accounting was ever given to the other partners concerning these payments. (T. 138) During this period of time, cash was always given personally to petitioner by Petlin or Horwich after checks, designated as loan or bonus checks on the disbursement ledger, had been cashed by either of them. (T. 137) After the other partners were bought out, the payment procedure was slightly modified. After 1969, two consecutive loan or bonus checks were made payable to Petlin and Horwich

who then cashed the checks. At least one-half of the total sums represented by these checks would be paid by either Petlin or Horwich to petitioner. These witnesses testified that the amounts of these loans would be paid back to the corporation and identified as income on which taxes would be paid. The payments were not made on any regular basis nor at any set time nor were the payments computed on any fixed percentage of sales to Safeway. (T. 136-182, 196-215, 227-228, 311, 314, 325-338) All sums received by Mutual in the conduct of its brokerage business, including all commissions earned on sales to Safeway, were deposited into a single business checking account. (T. 189, 194-196, 214-215, 336) The loan and bonus checks were drawn on this account. On occasion, these Mutual checks, instead of being cashed, were deposited by Petlin and Horwich into their personal accounts. Subsequently, checks drawn on these personal accounts would be cashed by them. (T. 143) In each instance, Petlin and Horwich determined what, if anything, to pay petitioner. None of the payments were made to petitioner pursuant to any formula or percentage or agreement based on specific Safeway business. (T. 145-149, 198-200, 213-214, 227-228, 313-314, 325-331, 337-338)

Other Evidence Presented at Trial:

Petlin, Horwich and other buyers in petitioner's office stated that petitioner, on occasion, would discuss over the phone market prices and conditions concerning products Safeway was interested in buying. The dates, frequency, participants and specific transactions involved in these phone conversations was not established. From the nature of the business, however, there were occasions when it was appropriate to discuss market conditions with individuals and firms making offerings to the Midwest Branch. (T. 185-186, 240-242, 319-320, 418-419, 421, 427)

There was also testimony that two suppliers did not place much direct business with Safeway until they used Mutual as

their agent. In each instance, these suppliers stated that they were contacted by Mutual. While no specific date or transaction was ever established, these suppliers testified that their success in selling to Safeway increased after they retained Mutual. One witness testified, over objection, that some ten to twelve years before trial, the petitioner had indicated to him that he would have to be paid to accept that broker's offerings. (T. 386-390)

The Government's summary witnesses testified that in 1974, 67.44% of Mutual's business was with Safeway. In that year, Mutual's earnings on sales placed with Safeway was $99,000. Mutual's total earned commissions in that year was $147,000. Mutual's business with safeway had increased, on a percentage basis, each year during the period alleged in the indictment. (T. 448-449)

Consequences to Safeway Regarding the Sums Allegedly Paid by Petlin and Horwich to Petitioner:

The evidence adduced at trial established that Safeway did not object to buying from Mutual if it saved money. (T. 284) The price and quality of the merchandise purchased by petitioner was always appropriate to market conditions and Safeway's needs. (T. 103, 282, 284, 425) He never bought at a higher price from Mutual. (T. 111) When the price and quality of the product offered by Mutual was not appropriate, petitioner would not accept Mutual's offerings. (T. 238-239)

In closing argument, the Government admitted that it did not dispute the fact that petitioner got the very best price he could for Safeway. The Government stated that it never contended that he bought at higher prices. (T. 539-560) All commissions earned by Mutual were legitimate. (T. 557)

The Indictment:

Petitioner was charged, together with Horwich and Petlin who were not named as defendants, with knowingly and willfully

having devised and intending to devise a scheme and artifice to defraud Safeway of the following:

1. Its right to have its business and affairs conducted honestly free from undue influence and conflict of interest;
2. Its right to the conscientious, loyal disinterested and unbiased services of petitioner in his capacity as manager and purchasing agent free from corruption, partially, willful omission, misconduct, conflict of interest and fraud; and
3. Certain secret profits obtained by petitioner in the performance of his official duties for Safeway.

While the indictment charged that the fraud began in 1965 and continued until March of 1975, with the exception of two mailings that occurred in January and March of 1975, the remaining eighteen counts alleged mailings in 1974. It was charged that for the purpose of executing the scheme and attempting to do so, petitioner knowingly and willfully caused to be placed in the mails and delivered by the Post Office the following:

1. Brokerage statements from Mutual to E. W. Kneip, Rochester Independent Packers, Inc., Aurora Packing Company, Kansas Beef Industries, and Central Meat Company;
2. Confirmations of sale from Mutual to Central Meat Company and the Midwest Branch of Safeway; and
3. Packer checks from Central Meat Company, E. W. Kneip, B&B Packing Company, and Rochester Independent Packers, Inc. to Mutual.

The indictment charged twenty counts based on the individual documents described above. Each document was the basis of a count in the indictment. The indictment is reproduced as Appendix D, pages A13-A20.

REASONS FOR GRANTING WRIT

I.

THE HOLDING OF THE COURT OF APPEALS THAT A SCHEME TO DEPRIVE AN EMPLOYER OF THE HONEST AND FAITHFUL SERVICES OF AN EMPLOYEE CONSTITUTES A FRAUD COGNIZABLE UNDER THE MAIL FRAUD STATUTE WITHOUT PROOF OF TANGIBLE LOSS OR INJURY TO THE EMPLOYER AND WITHOUT PROOF THAT SUCH HARM TO THE EMPLOYER WAS CONTEMPLATED BY THE EMPLOYEE NOT ONLY CONFLICTS WITH CURRENT DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL BUT ALSO EXPANDS THE STATUTE BEYOND ALL REASONABLE LIMITS.

The concept that a Section 1341 prosecution can be maintained in the context of a breach of duty has recently been used to prosecute public figures for accepting bribes to act in breach of their obligations toward their constituents. However, even in this context, the doctrine has been rejected where a public employee accepted "gratuities" that did not affect the performance of his duties. *United States* v. *McNeive* (Eighth Circuit, 1976), 536 F. 2d 1245, 1249-1252. As expressly stated in *United States* v. *Dixon* (Second Circuit, 1976), 536 F. 2d 1388, 1398-1401, this concept should not be extended into private relationships. More importantly, these concepts should not be extended when the alleged victim of the fraud suffers no tangible loss or injury and no harm is contemplated.[1] *United States* v. *Rabbitt* (Eighth Circuit, 1978) 583 F. 2d 1014, 1024-1026.

In *McNeive,* that Court explored the history of the use of Section 1341 to prosecute schemes which deprived individuals

1. See Statement of the Case, Consequences to Safeway Regarding the Sums Allegedly Paid by Petlin and Horwich to Petitioner, page 12 of this brief.

of intangible rights or interests. Beginning in the arena of political and civil rights, the concept has now been extended to prosecute recreant employees. However, in each instance in which the doctrine has been applied in private relationships, the victim of the scheme had suffered actual, tangible, pecuniary injury.[2] *Epstein* v. *United States* (Sixth Circuit, 1949), 174 F. 2d 754, 767; *United States* v. *Regent Office Supply Company* (Second Circuit, 1970) 421 F. 2d 1174, 1180; and *McNeive* pages 1249-1250. While the doctrine may well be justified to guard significant and, in the words of *McNeive*, "often constitutionally protected intangible rights," surely Safeway is not cloaked with such public importance that its employees may be prosecuted in federal criminal proceedings on felony charges when they act in breach of employment obligations that cause Safeway no tangible injury and when in the performance of their duties no harm to Safeway was even contemplated.

Section 1341 prohibits "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." While it can be argued that the phrase "or for obtaining money or property" modifies and limits the preceding phrase "any scheme or artifice to defraud," the Appellate Court impliedly held that the two phrases should be read in a disjunctive sense as prohibiting two distinct

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2. This is particularly true in the cases cited by the Court of Appeals in its opinion in support of the proposition that pecuniary loss is not an essential element of the crime of mail fraud. (Opinion, Appendix A, footnote 3, page A5) Of the cases cited, only *United States* v. *George* (Seventh Circuit, 1973) 477 F. 2d 508 *cert. denied* 414 U. S. 827 deals with breach of duty by an employee. In *George*, the victim of the fraud did suffer actual monetary loss. See *McNeive* page 1250. In *United States* v. *Reicin* (Seventh Circuit, 1974) 497 F. 2d 563 *cert. denied* 419 U. S. 996, an attorney and a medical doctor devised a scheme to defraud insurance companies in personal injury actions through submission of false and exaggerated reports, bills and employment time-loss statements to increase damages. The Court held in *Reicin* that *success* of the scheme was not an essential element of the crime. In *United States* v. *Reid* (D. C. Circuit, 1976) 533 F. 2d 1255 false invoices were approved and sent. In this case the victim paid double the amount actually due.

types of conduct, that is, schemes to defraud and schemes to obtain money or property fraudulently. The fraud was defined by the Court as a scheme to deprive Safeway of the honest and faithful services of its employee. The Court further held this conduct cognizable under the statute without proof of pecuniary loss to Safeway and without proof that harm to Safeway was even contemplated.[3] This interpretation expands the statute to new and unreasonable limits. Since only a "scheme to defraud" and not actual fraud is required for conviction, this language has been interpreted to mean that it is not essential that the Government allege or prove that the scheme *succeeded* and the victim was in fact defrauded. This part of the statute does not mean, however, that the Government can escape the burden of showing that actual tangible harm or injury either occurred or was contemplated by the petitioner to the victim alleged in the indictment. *Regent Office Supply Company,* pages 1180-1181.

The Indictment alleged that petitioner received monies from Petlin and Horwich for Safeway business. (See Appendix D, pages A13-A20.) Though petitioner was alleged to have benefited from his employment in a reprehensible way, this conduct neither tangibly injured Safeway nor affected the performance of his duties.

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3. The trial judge instructed the jury over objection as follows: "If you should find beyond a reasonable doubt that the defendant, John L. Lea, accepted monies and kickbacks from Mutual Brokerage Service Inc. while acting as purchasing agent for Safeway Stores Incorporated, then you may find that the defendant engaged in a scheme to defraud Safeway of its right to John L. Lea's loyal and faithful services although no actual monetary loss to Safeway need be shown."

II.

THE HOLDING OF THE COURT OF APPEALS THAT MAIL USE THAT IS NECESSARY AND PROPER IN THE CONDUCT OF ROUTINE AND INNOCENT BUSINESS PROCEDURES CARRIED ON BY LEGITIMATE BUSINESSES WARRANTS CONVICTION UNDER THE MAIL FRAUD STATUTE EVEN THOUGH THE CONTENTS OF THE MAILED MATERIAL CONTAIN NO FALSEHOOD OR MISREPRESENTATION, THE ALLEGED VICTIM OF THE FRAUD SUFFERS NO PECUNIARY LOSS OR INJURY, AND THE PRECISE RELATIONSHIP OF THE MAILINGS ALLEGED IN THE INDICTMENT TO THE SCHEME PRONOUNCED BY THE COURT IS NOT DEFINED, EXPLOSIVELY EXPANDS THE PARAMETERS OF THE FEDERAL MAIL FRAUD STATUTE AND CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT AND THE OPINIONS OF OTHER CIRCUIT COURTS OF APPEAL.

In the context of the federal mail fraud statute, must every use of the mails alleged in the indictment be connected to the scheme charged by the Government or can *any* use of the mails, irrespective of its specific link to the fraud and irrespective of its precise association with petitioner, satisfy the requirements of the statute and warrant conviction? Is proof of fraud alone sufficient to sustain a prosecution under § 1341 without evidence of mail use proximately connected to that fraud?

The Court defined the precise elements of the scheme to defraud specifically as follows:

1. Petitioner's disclosure of competitor offers or Safeway's anticipated future requirements; or
2. Petitioner's directing Mutual to specific suppliers that he believed would allow Mutual to offer a more competitive price; or
3. Petitioner's rejection of offers similar in price and quantity to those tendered directly by suppliers and subsequently accepted when placed through Mutual. (Opinion, Appendix A, page A3)

However, after having defined the scheme, the Court did not explore the precise relationship of each individual mailing charged in the indictment to these activities. Reasoning that the purpose of the fraud was to secure money for both Mutual and petitioner, the Court determined that the scheme successfully established Mutual as a conduit for funds, some of which were allegedly paid to petitioner. Therefore, an indispensable element of the fraud was Mutual's mailings of confirmations and brokerage statements, and the suppliers' mailings of commission checks. These uses of the mail were critical because funds flowed into Mutual as a proximate result of their use. Obviously, if Mutual does not place orders, neither they nor petitioner receive any money. Consequently, *any* confirmation, brokerage statement or supplier check generated by Mutual with regard to *any* Safeway business is connected to the fraud irrespective of the facts of a particular transaction, that is, irrespective of the individual who received or accepted Mutual offerings and irrespective of whether that offering was tainted, in any manner, by any element of the scheme to defraud defined by the Court. (Opinion, Appendix A, pages A6-A7). Quite simply, *but for* the mailings alleged in the indictment, Petlin and Horwich would not have obtained the monies to pay petitioner.

By abandoning any analysis of the specific connection between the fraud it defined and the precise mailings charged in the indictment, the Court concluded that *all* mail use involving any Safeway business with Mutual was connected to the scheme to get money and logically therefore *any* use of the mails satisfies the nexus requirement of the statute. Consequently, in the opinion of the Court of Appeals, in this case, every mailing involving, directly or indirectly, any of Safeway's business or affairs with Mutual, regardless of the nature of the material mailed, regardless of who mailed it or received it, and regardless of the circumstances of the mail uses, amounted to a felony

on the part of petitioner.[4] Additionally, the Court has charged to petitioner and declared a felony the conduct of a secretary or a billing clerk or cashier in mailing out, in the course of duty, the employer's lawful statements.[5] Resting on the premise that petitioner was paid pursuant to some type of formula or percentage based on Mutual transactions with Safeway, the Court's rationale overlooks the actual legitimate business conduct of both enterprises and further assumes that each Mutual offering to Safeway was established with petitioner's complicity. Neither the evidence adduced at trial nor the opinion of the Appellate Court precisely define any regular, ascertainable formula pattern of payment nor has any court identified any precise transaction tainted with the fraud defined in the decision. As pointed out in the dissenting opinion, no transaction alleged in the indictment has ever been linked by the evidence to petitioner. (Opinion, Appendix A, page A10)

Essentially, the Appellate Court has abandoned the specific counts of the indictment and has abandoned any analysis of the relationship of those uses of the mail to the specific conduct it has defined as fraudulent. The evidence did not establish that any count of the indictment, that is, any mail use, was connected to petitioner or to any activity of petitioner. Can his conviction for mail fraud be affirmed on the basis of mail use in connection with a legitimate offer to sell meat made up by Mutual in accord with market conditions and the desires of its client suppliers? Furthermore, can the conviction be affirmed on mail uses not connected to any payment to petitioner by Mutual?[6]

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4. In this context see *United States* v. *Brickey* (E. D. Arkansas, 1969) 296 F. Supp. 742, 749 wherein the Court stated it was "simply not prepared to go that far."

5. This was the analogy which the Court in *Parr* v. *United States* (1959) 363 U. S. 370, 386 "happily" was not called on to determine.

6. The last alleged payment by Petlin and Horwich to petitioner occurred on approximately August 25, 1974. (T. 134-136, 180, 209-211, 310, 318, 334-335, 351.) Petitioner was discharged by Safeway on February 20, 1975. (T. 76) In this context, five counts

(Footnote continued on next page.)

Mutual submitted innumerable offers to Safeway which were accepted and rejected by both petitioner and other buyers in his office. Would any Mutual offer not based on petitioner's disclosure of competitor offers or Safeway's anticipated future requirements (Point 1 of the Court's definition of the scheme), or petitioner's directing Mutual to specific suppliers allowing Mutual to offer a more competitive price (Point 2 of the Court's definition), or petitioner's rejection of offers similar in price and quantity to those tendered directly by suppliers and subsequently accepted when placed through Mutual (Point 3) properly be a basis for a mail fraud conviction? Additionally, can any of these elements be assumed? Mutual was in the meat brokerage business. Because many of its offers to Safeway were accepted by petitioner and others in his office does not thereby either establish or prove that any transaction was fraudulent. Clearly, if any Mutual offer does not rest on any element incident to the scheme defined by the Court, mail use in connection with that offer could not be in furtherance of any scheme. Stated differently, the evidence must specifically establish a direct link between each mailing alleged in the indictment and one or more elements of the fraud defined by the Court. In essence, the Appellate Court concentrated its attention on the supposed scheme to defraud and disregarded the specific mailings charged in the indictment that constitute the gist of offense.

The rationale presented by the Court that *but for* the mailings Mutual would not have obtained the monies to pay petitioner and that therefore Mutual was a conduit of funds for petitioner has been expressly rejected by other courts. While this rationale points out the link between the sales, the mailings and the payments to petitioner, it does not address

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(Footnote continued from preceding page.)
of the indictment charged mail use after the last payment was allegedly made to petitioner. Of these, one count charged mail use after petitioner was discharged. (Indictment, Appendix D, page A19, specifically counts 14 through 18.)

the crucial question whether the confirmations, brokerage statements and supplier checks alleged in the indictment were sent or received for the purpose of executing the scheme to defraud defined by the Court. *United States* v. *Tarnopol* (Third Circuit, 1977), 561 F. 2d 466, 472. The mailings charged in the indictment were initiated by Mutual, not by petitioner, and they represented a perfectly proper routine procedure in aid of the conduct of business between Mutual, Safeway and the suppliers. These mailings were intrinsically innocent, and indeed necessary, and there is otherwise no proof to establish that these mailings were in any way connected to any element of the scheme defined by the Court. *Tarnopol* at page 473. Not one of the mail uses charged in the indictment was fraudulent in itself or had any proximate connection with any disloyal or illegal activity. *United States* v. *Brickey* (E. D. Arkansas, 1969), 296 F. S. 742, 749-750.

In the instant case, mail use was conducted for a lawful purpose, that is, the legitimate business activity of the enterprises involved in buying and selling meat. None of the mailings alleged in the indictment contained any false representations nor were the proceeds of any scheme received through the mails. Crucially, the confirmations, brokerage statements and supplier checks complained of in the indictment constituted innocent mail use that was regularly employed to carry out a necessary or convenient procedure by legitimate businesses. These uses of the mail were not shown to be related to the fraud specifically defined by the Court even though petitioner was allegedly paid from the funds received through these mailings. *Parr* v. *United States* (1959) 363 U. S. 370, 389, 391; *Tarnopol* at page 472; *United States* v. *Beall* (N. D. California, 1954), 126 F. Supp. 363, 365-366. Mail use must be part of the execution of the scheme to defraud defined by the Court. *Kann* v. *United States* (1944) 323 U. S. 88, 95. At the very least, the specific relationship of each mail use alleged in the indictment to the fraud must be established. *United States* v. *Brown* (Third Cir-

cuit, 1978) 583 F. 2d 659, 668. Under the holding of the Court of Appeals in the case at bar, that precise connection is not legally required.

III.

THE ADMISSION IN A JURY TRIAL OF TESTIMONY OF PRIOR "BAD ACTS" OCCURRING TWELVE YEARS BEFORE TRIAL UNDER RULE 404(b) OF THE FEDERAL RULES OF EVIDENCE WAS IMPROPER AND SHOULD HAVE BEEN EXCLUDED UNDER RULE 403 OF THE FEDERAL EVIDENCE RULES.

In footnote 6 on page A7 of the opinion, the Appellate Court stated:

> As we view the scheme, it began *when Lea first proposed the arrangement* to Petlin and Horwich. (Emphasis added.)

Again on page A9, the Court stated:

> The testimony here at issue demonstrated that Lea had previously sought to establish a relationship with another meat broker similar to the relationship with Mutual.

Nothing in the testimony of either Petlin or Horwich supports these statements. The testimony of these witnesses indicated that the arrangement did not first begin with petitioner but rather with those witnesses or one of their silent partners. (T. 128-136, 308-310) Standing alone, this statement by the Court would not have much consequence. However, the Appellate Court's error underlines the inherent conflict between Rules 403 and 404(b) of the Federal Evidence Rules that cannot be resolved by mechanical application of the later Rule. Viewed in relation to the testimony of prior bad acts, this misstatement in the opinion underlines the impact of such testimony not only on the jury but also upon the Appellate Court. Clearly, the probative virtues of this evidence did not outweigh its prejudicial proclivities. With regard to the payments allegedly made to the petitioner, did the prosecution need additional evidence? This

testimony had no purpose other than prejudice. It ought not to have been allowed.

CONCLUSION.

Regretably, petitioner was found guilty of accepting money from Petlin and Horwich. His guilt was established by his avarice, his "other crimes" and moral corruption, not by any injury to Safeway or any use of the mails.

For the reasons hereinabove set forth, Petitioner prays that the Court grant his petition for a writ of certiorari.

Dated: April 22, 1980

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 79-1940

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN L. LEA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-CR-48—Bernard M. Decker, *Judge.*

ARGUED JANUARY 15, 1980—DECIDED FEBRUARY 19, 1980

Before CUMMINGS, WOOD, and CUDAHY, *Circuit Judges.*

WOOD, *Circuit Judge.* A jury convicted appellant Lea on twenty counts of engaging in a scheme to defraud within the meaning of the federal mail fraud statute. 18 U. S. C. § 1341.[1]

1. 18 U. S. C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any

(Footnote continued on next page.)

The principal ground upon which he appeals is that the government failed to establish a sufficient nexus between the scheme and the mailings that serve as the jurisdictional basis for prosecution under that statute.

I.

A. *Background*

Safeway Stores, Inc. (Safeway) employed Lea as manager of the meat buying department of its Midwest Buying Office.[2] In that capacity, Lea was responsible for the purchase at wholesale of fresh meat for ultimate sale in Safeway's retail food stores.

Standard operating procedure, to the extent relevant to this appeal, required that purchases be made using an offer and acceptance method. Safeway publicized specifications of its immediate needs, and interested suppliers or brokers promptly extended offers, usually by telephone. Negotiation tactics such as disclosure of a competing offer or indication of price relativity were strictly prohibted. The buyer accepted the most favorable offer by telephoning the supplier or broker and conveying a purchase order number. The original of the corresponding purchase order form was then mailed to the supplier or, where a broker conveyed the offer, to the broker. Safeway's corporate office, accounting department, and receiving warehouse each received copies, and the Midwest Buying Office retained one. Corporate headquarters received additional con-

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(Footnote continued from preceding page.)

post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. The Midwest Buying Office, one of four scattered nationwide, was originally located in Chicago but relocated to Prairie Village, Kansas in May 1971.

firmation each week when the Midwest Buying Office sent a form listing suppliers who extended offers, the details of each offer, accepted offers, and where relevant, intermediary brokers.

Safeway's corporate policy required that buyers abide by the wishes of the seller regarding whether to transact business directly or through a broker. Although the policy expressly forbade buyers from attempting to deal directly for the purpose of eliminating a broker's commission, Safeway encouraged buyers wherever possible, but within the constraints of the foregoing limitations, to deal directly with suppliers. Nationally, in an average year, Safeway purchased ninety-seven to ninety-eight percent of its carcass beef in transactions free of broker intervention.

B. *The Scheme to Defraud*

Allen Petlin and William Horwich were partners in a Chicago meat brokerage business known as Mutual Brokerage Service (Mutual). Initially, Mutual was unable to do any significant business with Safeway's Midwest Buying Office. That changed suddenly in late 1966 when Petlin and Horwich began paying kickbacks to Lea on orders that Mutual placed for its client suppliers.

Petlin or Horwich frequently telephoned Lea to convey offers to supply Safeway with carcass meat. During these conversations Lea would often divulge the content of Mutual's competitors' offers and Safeway's anticipated future requirements. Lea did not provide comparable information to any other broker or supplier. When necessary, Lea also directed Mutual to specific suppliers that Lea believed would allow Mutual to offer a more competitive price. Two suppliers offered further evidence of Mutual's favored status when they testified that Mutual contacted them shortly after they had tried unsuccessfully to do business directly with Lea. Offers similar in price and quantity to those tendered directly to and rejected by Lea were accepted when tendered through Mutual. Extreme pressure was thus

placed on suppliers to extend offers to Safeway only through Mutual.

Upon receipt of the purchase order form confirming acceptance, Mutual, as a matter of course, mailed confirmations of sale to the appropriate supplier and to the Midwest Buying Office. After delivery, Safeway sent payment directly to the supplier. Each month Mutual mailed to suppliers with whom they did business during the preceding month a brokerage statement listing commissions due and owing. Suppliers then mailed commission checks directly to Mutual. As far as Safeway was concerned, the broker effectively dropped out of the transaction upon receipt of the confirmation of sale. Commissions were a matter exclusively between supplier and broker. Safeway, however, remained interested in monitoring its buyers' use of brokers. Accordingly, standard operating procedure required that when a buyer consummated a transaction through a broker he make a notation to that effect on the purchase order form and the weekly cumulative form. Nevertheless, at Lea's direction, forms sent from the Midwest Buying Office to Safeway's corporate headquarters contained no indication of Mutual's involvement.

Mutual deposited suppliers' commission checks in a checking account at a Chicago bank and paid kickbacks to Lea from funds secured from the same account. The amount of each kickback was keyed to the volume of business that Mutual placed with Safeway. Over the eight-year duration of the scheme, Mutual earned $537,350 in commissions and kicked back $29,000 to Lea. During the same period, Mutual's share of Safeway's midwest carcass beef purchases increased from a few scattered sales to more than fifty percent.

II.

The government based its prosecution under the mail fraud statute on the theory that the foregoing constituted a scheme among Lea, Petlin, and Horwich to defraud Safeway of the

honest and faithful services of its employee, Lea.[3] *See United States* v. *Bush*, 522 F. 2d 641 (7th Cir. 1975), *cert. denied*, 424 U. S. 977 (1976); *United States* v. *George*, 477 F. 2d 508 (7th Cir.), *cert. denied*, 414 U. S. 827 (1973). Alleged to be in furtherance of the scheme were three kinds of mailings: (1) written confirmations sent by Mutual to suppliers confirming the sale of meat through Mutual to Safeway, (2) brokerage statements sent by Mutual to suppliers detailing charges for brokerage commissions on sales to Safeway, and (3) checks in payment of the brokerage commission charges sent by suppliers to Mutual.

Lea argues on appeal that the nexus between the mailings and the scheme to defraud Safeway is too attenuated to allow prosecution under the mail fraud statute. That Lea did not participate in any of the mailings does not preclude application of the statute. *See Pereira* v. *United States*, 347 U. S. 1 (1954). Section 1341 is applicable not only where one "places" an item in a mail depository but also where one "knowingly causes" a mailing. The Supreme Court has settled the question that a mailing is knowingly caused "[w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even

3. Lea asserts that Safeway suffered no pecuniary loss and that therefore the mail fraud statute is inapplicable. We find no support in the record for this characterization of the facts, nor is there support in the case law for this characterization of the law. Two suppliers testified that the prices at which they offered and sold beef to Safeway were increased to cover the cost of Mutual's commission charges. One of these suppliers testified further that shortly after Lea rejected a direct offer from his supply company, Mutual contacted him and negotiated a sale to Safeway at a higher price. Even accepting for the moment Lea's dubious assumption that the foregoing does not establish pecuniary loss, the government's theory of prosecution cannot be assailed on this ground. The law in this circuit is that pecuniary loss is not an essential element of the crime of mail fraud. *United States* v. *Reicin*, 497 F. 2d 563, 571 (7th Cir.), *cert. denied*, 419 U. S. 996 (1974); *United States* v. *George*, 477 F. 2d 508, 512 (7th Cir.), *cert. denied*, 414 U. S. 827 (1973); *see United States* v. *Reid*, 533 F. 2d 1255, 1261 (D. C. Cir. 1976).

though not actually intended. . . ." *Id.* at 8-9. Here, the parties to the scheme contemplated that Mutual would generate substantial commissions on transactions between suppliers and Safeway and then pay kickbacks to Lea from these funds. Mutual's engagement in the ordinary business practices of a meat broker was therefore not only foreseeable but also essential to the scheme. Under *Pereira,* the only legal conclusion that can flow from these facts is that Lea knowingly caused the mailings that serve as the basis of his mail fraud conviction.

Notwithstanding the foreseeability of the mailings, Lea raises a number of subsidiary points that he asserts make the nexus between the mailings and the scheme too attenuated to satisfy the statutory requirement that the mailing be "for the purpose of executing such scheme." At the outset, we note that the government need not show that the mailing was an essential part of the scheme; the mail fraud statute requires only that the mailing be incident to an essential part of the scheme. *Compare id.* at 8, *with United States* v. *Maze,* 414 U. S. 395, 400 (1974). We held previously in *Ohrynowicz* v. *United States,* 542 F. 2d 715 (7th Cir.), *cert. denied,* 429 U. S. 1027 (1976), that a mailing satisfies this requirement where it is a normal concomitant of a transaction that is essential to the fraudulent scheme.

The basis of the mail fraud prosecution in *Ohrynowicz* was a "check-kiting" scheme,[4] in which the defendants opened checking accounts at a number of banks using fictitious names and addresses. All of the fraudulent transactions were carried out with the temporary nonpersonalized checks that the banks hand-delivered immediately upon opening the accounts. Consequently, the government instead relied on the printers' later mailings of the personalized checks that the banks routinely ordered for its

4. "Check-kiting," as its name implies, involves the floating of worthless checks between bank accounts containing insufficient funds. By taking advantage of the time lag necessary for clearance, participants temporarily may be able to conceal fraudulent cash withdrawals.

customers. These mailings, clearly not essential to the scheme,[5] were ordinary incidents of an essential element—the opening of checking accounts. We found that relation sufficient despite the fact that the items mailed were not instruments of the fraudulent scheme.

Our examination of the record in the case at bar reveals substantial evidence supporting the government's theory of a broad-based scheme to defraud among Lea, Petlin, and Horwich. By steering a major portion of Safeway's beef purchases to suppliers dealing through Mutual, the scheme established Mutual as a conduit for funds, some of which were kicked back to Lea. An indispensable element of the scheme was the use of Mutual as a broker through which to funnel Safeway's purchases. Mutual's mailings of confirmations and brokerage statements, and the suppliers' mailings of commission checks were normal concomitants of the brokerage transactions and were therefore incident to an essential element of the scheme.[6]

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5. The defendants probably would have preferred that the printers not mail the personalized checks since the only foreseeable consequence of those mailings was to facilitate the banks' discovery of the fraud.

6. Lea's restrictive definition of the parameters of the scheme serves as the basis for a number of his other assertions of error. He contends first that the government's reliance on mailings that occurred before the payments of kickbacks is not supportable under the mail fraud statute. Implicit in this argument is that the scheme did not begin until payment of the first kickback. As we view the scheme, it began when Lea first proposed the arrangement to Petlin and Horwich. Accordingly, none of the mailings alleged in the indictment occurred before commencement of the scheme.

The contention that five of the counts cannot stand because the mailings upon which they were based occurred after the last kickback is similarly without merit. Mutual's receipt of commissions on the last of the sales that it brokered had its roots in the preferential treatment accorded it by Lea. Since the payment of the last kickback did not mark the conclusion of the scheme, Lea's reliance on *United States* v. *Maze*, 414 U. S. 395 (1974), is misplaced.

Lastly, we reject Lea's argument that the government's failure to link specific kickbacks to specific mailings is fatal. Lea, Petlin, and Horwich devised a continuing scheme to defraud. The government satisfied its burden of showing the existence of a sufficient nexus between the mailings and the continuing scheme. Greater specificity is not required.

The relation between the scheme and the mailings here is even closer than that found sufficient in *Ohrynowicz*. In that case, though the mailing was incident to an essential element, the items mailed were at best superfluous to the success of the scheme. Here, the items mailed, though probably not absolutely essential to success, furthered the scheme. To obtain funds to pay the kickbacks, Mutual had to secure commission payments from the suppliers who sold to Safeway. In the ordinary course of business, the confirmations and commission statements facilitated receipt of the commission checks, which, after being deposited in Mutual's bank account, served as the source of funds for the payments to Lea.

We do not hold today that all kickback schemes may be prosecuted under the mail fraud statute merely because one of the participants uses or causes another to use the mails. The government must still show, as it did here, the requisite nexus between the scheme and the mailings relied upon to invoke the statute. But the existence of that nexus in a particular case should not be evaluated in a vacuum. Proper analysis demands at the threshold a close examination of the parameters of the scheme. Where that examination discloses that an essential element of the scheme is expansion of a legitimate business into nonlegitimate areas, mailings incident to the nonlegitimate activities may serve as the basis for prosecution under the mail fraud statute.

III.

Another Chicago-based meat broker testified that ten or twelve years before trial Lea offered to direct some of Safeway's meat purchases to him provided he kicked back a portion of the commissions earned on those purchases. The trial judge admitted that testimony for the purpose of showing motive and intent. Rule 404(b) of the Federal Rules of Evidence authorizes the admission of evidence of "bad acts" for this limited purpose when its probative value outweighs its prejudicial effect. *United States* v. *Weidman*, 572 F. 2d 1199, 1202-03 (7th Cir.),

cert. denied, 439 U. S. 821 (1978). The necessary balancing is left to the sound discretion of the trial judge. *See United States* v. *Jones,* 438 F. 2d 461, 465 (7th Cir. 1971). Although not the exclusive indicia of probativeness, the prior act must be "similar to the offense charged and close enough in time to be relevant." *United States* v. *Fierson,* 419 F. 2d 1020, 1022 (7th Cir. 1969). The testimony here at issue demonstrated that Lea had previously sought to establish a relationship with another meat broker similar to the relationship with Mutual. Further, the testimony related to a meeting that occurred no later than two years after commencement of Lea's relationship with Mutual.

We recognize that admission of evidence of prior "bad acts" is always prejudicial. However, under these facts, there has been no showing that the trial judge's decision to admit the evidence was an abuse of discretion.

IV.

We have considered Lea's remaining contention—that the trial court improperly instructed the jury on the weight to be given the testimony of witnesses testifying under grants of immunity—and find that it lacks merit.[7] *See United States* v. *Demopoulos,* 506 F. 2d 1171, 1179-80 (7th Cir. 1974), *cert. denied,* 420 U. S. 991 (1975). AFFIRMED.

7. The trial judge read the following instruction:

The witnesses, Allen Petlin and William Horwich, testified under a grant of immunity, pursuant to a court order, after a petition by the government was filed requesting such an order. Under the law, none of the testimony during this trial can ever be used against them in any subsequent criminal proceeding. However, if any one of them testified untruthfully under this grant of immunity, he could be prosecuted for perjury or the making of a false statement even though he was testifying under a grant of immunity.

The testimony of a witness who provides evidence against a defendant for immunity from prosecution, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the witness' testimony has been affected by interest, or by prejudice against defendant.

CUDAHY, *Circuit Judge*, dissenting. I agree that each kickback payment need not be related to a specific shipment of meat (or the mailings pertaining to it). I do think, however, that all the shipments of meat (and related documents), furnishing the basis of the indictment, must have arisen from a transaction in which Lea participated. The government as much as conceded that the latter relationship was not affirmatively and specifically established. For example, the government asserts at pp. 24-25 of its brief:

> "Further, even if a Mutual offer was accepted by an employee other than Lea, that fact by itself would not remove the transaction from the fraudulent scheme. Mutual's offer would nonetheless have been formulated with the benefit of knowledge of competitor's prices improperly given by Lea in violation of company policy. In addition, the suppliers were compelled to make their offers through Mutual by their inability to do business directly with Lea."

The facts assumed by these arguments are unclear. A "nexus" based on such dubious arguments is insufficient. I respectfully dissent.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B.

Opinion by Judge Wood
Judge Cudahy dissenting

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 19, 1980

Before

Hon. Walter J. Cummings, *Circuit Judge*
Hon. Harlington Wood, Jr., *Circuit Judge*
Hon. Richard D. Cudahy, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-1940 *vs.*	No 79-CR-48
JOHN L. LEA, *Defendant-Appellant.*	Bernard M. Decker, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this court filed this date.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 24, 1980

Before

Hon. Walter J. Cummings, *Circuit Judge*
Hon. Harlington Wood, Jr., *Circuit Judge*
Hon. Richard D. Cudahy, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-1940 *vs.*	No 79-CR-48
JOHN L. LEA, *Defendant-Appellant.*	Bernard M. Decker, Judge.

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendant-appellant, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Filed Jan. 23, 1979

UNITED STATES OF AMERICA		
vs.	}	No. 79 CR 48
JOHN L. LEA		

Violation: Title 18, United States Code, Section 1341

The Special November 1978 Grand Jury charges:

1. At all times material herein, Safeway Stores Incorporated and its divisions, hereinafter referred to as Safeway, was a corporation which sold retail meat and groceries throughout the United States.

2. At all times material herein, John L. Lea was employed as a manager and purchasing agent in the meat buying department, Midwest Branch, of Safeway, and in said capacity obtained, purchased and bought fresh beef and various other meat food products used in the operation of Safeway.

3. At all times material herein, Mutual Brokerage Service, Inc., hereinafter referred to as Mutual, was a corporation doing business in the Northern District of Illinois and elsewhere, which served as a broker in the sale of meat food products by various meat suppliers to safeway.

4. At all times material herein, William Horwich and Allen Petlin were stockholders and operating managers of Mutual.

5. At all times material herein, Kansas Beef Industries, Inc., commonly known as KBI, was a meat supplier engaged in the business of purchasing and slaughtering live animals and selling fresh beef and meat food products.

6. At all times material herein, E. W. Kneip, Inc., commonly known as E. W. Kneip, was a meat supplier engaged in the business of purchasing and slaughtering live animals and selling fresh beef and meat food products.

7. At all times material herein, B & B Packing Co., commonly known as B & B, was a meat supplier engaged in the business of selling fresh beef and meat food products.

8. At all times material herein, Central Meat Co., commonly known as Central Meat, was a meat supplier engaged in the business of selling fresh beef and meat food products.

9. At all times material herein, Rochester Independent Packer, Inc., commonly known as RIPCO, was a meat supplier engaged in the business of purchasing and slaughtering live animals and selling fresh beef and meat food products.

10. At all times material herein, Aurora Packing Co., commonly known as Aurora, was a meat supplier engaged in the business of purchasing and slaughtering live animals and selling fresh beef and meat food products.

11. Beginning in or about 1965, and continuing thereafter up to and including March 1975, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

JOHN L. LEA

defendant herein, Wililam Horwich and Allen Petlin, not named as defendants herein, and others to the Grand Jury unknown, did unlawfully, wilfully and knowingly devise and intend to devise a scheme and artifice to defraud Safeway of the following:

(a) Its right to have the company's business and affairs conducted honestly, impartially, free from deceit, craft,

trickery, corruption, fraud, undue influence, dishonesty, and conflict of interest;

(b) Its right to the conscientious, loyal, honest, faithful, disinterested and unbiased services, decisions, actions and performance of duties by defendant John L. Lea, in his capacity as manager and purchasing agent, free from corruption, partiality, wilful omission, bias, dishonesty, misconduct, conflict of interest and fraud;

(c) Certain secret profits obtained by defendant John L. Lea in the performance of his official duties for Safeway.

12. It was part of said scheme and artifice to defraud that William Horwich and Allen Petlin of Mutual contacted and caused to be contacted the various meat suppliers named in paragraphs five through ten of this indictment, hereinafter referred to as meat suppliers, and advised and caused them to be advised that Safeway was interested in purchasing fresh beef and meat food products from them.

13. It was further a part of said scheme and artifice to defraud that defendant John L. Lea would and did place and cause to be placed, on behalf of Safeway, orders to purchase fresh meat and meat food products.

14. It was further a part of said scheme and artifice to defraud that Mutual would and did represent, as brokers, the meat suppliers for which purchase orders were issued and caused to be issued by defendant John L. Lea.

15. It was further a part of said scheme and artifice to defraud that Mutual issued and caused to be issued confirmations of sale evidencing the sales of fresh beef and meat food products by the meat suppliers to Safeway.

16. It was further a part of said scheme and artifice to defraud that the meat suppliers would and did deliver fresh beef and meat food products to various divisions of Safeway for which meat suppliers issued and caused to be issued invoices to said

divisions of Safeway for the sale of said fresh beef and meat food products.

17. It was further a part of said scheme and artifice to defraud that the division of Safeway purchasing fresh beef and meat food products would and did issue and caused to be issued checks to meat suppliers in payment for the delivery of fresh beef and meat food products.

18. It was further a part of said scheme and artifice to defraud that Mutual would and did issue and cause to be issued brokerage statements to meat suppliers for brokerage commissions on fresh beef and meat food products sold by meat suppliers through Mutual to Safeway.

19. It was further a part of said scheme and artifice to defraud that the meat suppliers would and did issue and cause to be issued checks to Mutual in payment of brokerage commissions for fresh beef and meat food product sales by the meat suppliers to Safeway.

20. It was further a part of said scheme and artifice to defraud that William Horwich and Allen Petlin, of Mutual, would and did pay and cause to be paid monies and kickbacks to defendant John L. Lea: the amount of monies and kickbacks paid were based on fresh beef and meat food product sales brokered by Mutual, for the meat suppliers Mutual represented on sales made to defendant John L. Lea, acting as purchasing agent for the meat buying department, Midwest Branch, Safeway.

21. It was further a part of said scheme and artifice to defraud that defendant John L. Lea, in order to perpetrate the scheme, conceal its existence, and to continue to receive the payments and kickbacks described above, would and did sign a conflict of interest agreement with Safeway falsely representing that he had not received any gift or gratuity of any kind from a meat supplier's reprsentative or any concern or individual doing business or seeking to do business with Safeway.

22. It was further a part of said scheme and artifice to defraud that defendant John L. Lea would and did fail to disclose to Safeway the fact that as an employee of Safeway, acting in the capacity of purchasing agent, he was deriving monies and kickbacks, which he converted to his own use and benefit, as a result of business conducted by him, on behalf of Safeway.

23. It was further a part of said scheme and artifice to defraud that defendant John L. Lea would and did continue to represent to Safeway that defendant John L. Lea was an employee, honest and loyal to the best interests of Safeway, and that said defendant would and did fail to disclose the conflict of interest and disloyalty of defendant John L. Lea in acting on behalf of Safeway in their dealings with Mutual and meat suppliers represented by Mutual.

24. On or about the dates listed below in the Northern District of Illinois, Eastern Division and elsewhere,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly and wilfully:

a. Placed and caused to be placed the envelopes listed below in the United States mails to be sent and delivered according to the directions thereon by the United States Postal Service, each such use of the mails being a separate count of this indictment:

Count	Sender/Contents	Addressee	Date of Mailing On or About
1	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	E. W. Kneip 7501 Brown Street Forest Park, Illinois	In or about February 1974
2	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Rochester Independent Packers, Inc. 11 Independence Street Rochester, New York	In or about February 1974
3	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Aurora Packing Company 211 New York Street Aurora, Illinois	In or about March 1974
4	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Confirmation # 26418)	Central Meat Company 824 W. 38th Place Chicago, Illinois	March 4, 1974
5	Central Meat Company 824 W. 38th Place Chicago, Illinois (Packer Check # 06338)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645	April 5, 1974
6	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Kansas Beef Industries, Inc., Kansas Packing Division 406 E. 21st St. Wichita, Kansas	In or about May 1974
7	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Confirmation # 26680)	Safeway Meat Buying Department, Midwest Branch 2310 W. 75th Street Prairie Village, Kansas	April 30, 1974
8	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	E. W. Kneip 7501 Brown Street Forest Park, Illinois	In or about May 1974
9	E. W. Kneip 7501 Brown Street Forest Park, Illinois (Packer Check)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645	On or about June 5, 1974

Count	Sender/Contents	Addressee	Date of Mailing On or About
10	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Rochester Independent Packers, Inc. 11 Independence Street Rochester, New York	In or about August 1974
11	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Confirmation # 26978)	Safeway Meat Buying Department, Midwest Branch 2310 W. 75th Street Prairie Village, Kansas	July 2, 1974
12	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Kansas Beef Industries, Inc., Excel Division 900 E. 21st Street Wichita, Kansas	In or about August 1974
13	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Confirmation # 26946)	Safeway Meat Buying Department, Midwest Branch 2310 W. 75th Street Prairie Village, Kansas	June 24, 1974
14	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Central Meat Company 824 W. 38th Place Chicago, Illinois	In or about September 1974
15	Central Meat Company 824 W. 38th Place Chicago, Illinois (Packer Check # 07251)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645	September 6, 1974
16	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Confirmation # 27357)	Safeway Meat Buying Department, Midwest Branch 2310 W. 75th Street Prairie Village, Kansas	September 25, 1974
17	B & B Packing Company 4404 W. Berteau Chicago, Illinois (Packer Check # 26473)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645	In or about January 1975
18	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Rochester Independent Packers, Inc. 11 Independence Street Rochester, New York	In or about March 1975

b. Caused the envelopes listed below to be delivered according to the directions thereon by the United States Postal Service, each such use of the mails being a separate count of this indictment:

Count	Sender/Contents	Addressee	Date of Delivery On or About
19	Rochester Independent Packers, Inc. 11 Independence Street Rochester, New York (Packer Check # 02588)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645	February 5, 1974
20	Rochester Independent Packers, Inc. 11 Independence Street Rochester, New York (Packer Check # 04980)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois	July 5, 1974

All in violation of Title 18, United States Code, Section 1341.

A True Bill:

.....

Foreman

.....

United States Attorney

PCP:df

Supreme Court, U. S.
FILED
JUN 17 1980
MICHAEL RODAK, JR., CLERK

No. 79-1672

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN L. LEA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on February 19, 1980. A petition for rehearing was denied on March 24, 1980 (Pet. App. C). The petition for a writ of certiorari was filed on April 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conduct constituted fraud within the contemplation of the mail fraud statute (18 U.S.C. 1341).

2. Whether the mailings upon which petitioner's convictions were based had a sufficient nexus to the fraud.

3. Whether the admission of proof of other similar conduct on petitioner's part was an abuse of discretion.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 20 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of two years' imprisonment on each count and a fine of $1000 on each of the first ten counts, for a total fine of $10,000. The court of appeals affirmed, with one judge dissenting (Pet. App. A1-A10).

Petitioner, the purchasing agent and manager of the meat buying department of the Midwest Buying Office of Safeway Stores, Inc., was charged with devising, and causing the use of the mails to execute, a scheme to defraud his employer of its right to have its business conducted honestly, of its right to his faithful services, and of certain secret profits that he obtained in the performance of his official duties (Pet. App. A14-A15). As set forth in the opinion of the court of appeals (*id.* at A2-A4), the evidence showed that petitioner was responsible for the purchase at wholesale of fresh meat for ultimate sale in Safeway's retail food stores. The procedure used by Safeway was to publish specifications of its immediate needs so that interested suppliers or brokers could extend offers, usually by telephone. Safeway's buyer would accept the most favorable offer by telephoning the low bidder and conveying a purchase order number. Company policy forbade the disclosure to bidders of competing offers or any indication of price

relativity.[1] Buyers were encouraged to deal directly with suppliers, but were required to abide by the suppliers' wishes if the latter desired to transact business through a broker; in an average year, 97% to 98% of the company's national carcass beef requirements were filled by direct purchases from suppliers rather than through brokered transactions (*id.* at A2-A3).

The scheme to defraud, which began in 1966, consisted of the payment of kickbacks to petitioner by Mutual Brokerage Service, a meat brokerage business, in return for petitioner's assistance in getting meat suppliers to place their orders through Mutual.[2] The kickbacks were paid out of an account in which Mutual deposited its commissions on the orders it placed with Safeway for its client suppliers (Pet. App. A3-A4). Before instituting this arrangement Mutual had been unable to do any significant business with Safeway's Midwest Buying Office; in the eight years thereafter, Mutual accounted for more than 50% of Safeway's midwest carcass beef purchases, earned $537,350 in commissions, and paid $29,000 in kickbacks to petitioner (*id.* at A4). As part of the scheme, petitioner—contrary to express company

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[1]Company policy also forbade buyers, upon pain of immediate dismissal, to accept gifts or favors from those doing business with the company, and provided that a buyer accepting gifts or favors could be required to account for the value of whatever he received (Tr. 48-49; G.X. H). On October 15, 1969, in response to a question on a form that all branch managers were required to fill out, petitioner answered "no" to the question whether in the past five years he had received anything of value from any supplier (Tr. 65, 68; G.X. F) and signed a written acknowledgement that he occupied a fiduciary or confidential position with the company and owed it a continuing duty of loyalty and good faith (Tr. 69).

[2]The two proprietors of Mutual were named in the indictment as unindicted participants in the fraudulent scheme (Pet. App. A14). Both testified for the government.

policy—would disclose to Mutual both the content of competitors' offers and Safeway's anticipated future requirements; he would also direct Mutual to specific suppliers that he believed would enable Mutual to offer a competitive price (*id.* at A3). Two suppliers testified that they were contacted by Mutual after they had tried unsuccessfully to do business directly with petitioner. Offers similar in price and quantity to those rejected by petitioner were thereafter accepted when tendered through Mutual (*ibid.*).

ARGUMENT

1. The court of appeals correctly held (Pet. App. A5 n.3) that petitioner's scheme constituted a "fraud" within the meaning of the mail fraud statute. Contrary to petitioner's contention (Pet. 14-16), proof of tangible loss is not an essential element of the mail fraud offense. *United States* v. *Bohonus*, No. 79-1449 (9th Cir. Mar. 27, 1980), petition for cert. pending, No. 79-6532; *United States* v. *Louderman*, 576 F. 2d 1383, 1386-1388 (9th Cir.), cert. denied, 439 U.S. 896 (1978). A private employer is no less entitled than a public employer to the honest and faithful services of its employees. *United States* v. *Bohonus*, *supra*; *United States* v. *Hasenstab*, 575 F. 2d 1035, 1038-1039 (2d Cir.), cert. denied, 439 U.S. 827 (1978); *Abbott* v. *United States*, 239 F. 2d 310, 314 (5th Cir. 1956). Safeway, in short, was entitled to have petitioner deal with suppliers and make his purchasing decisions with its best interest in mind, not as a means of enriching himself. As the court of appeals noted (Pet. App. A5 n.3), the payment of kickbacks to a purchasing agent must inevitably be reflected in higher costs to the purchaser, even though the precise amount of additional cost may not be readily identifiable. In any event, the indictment charged that Safeway was defrauded of

petitioner's secret profits (*i.e.*, the kickbacks)—profits which, as a matter of law, rightfully belonged to Safeway. Tangible loss was thus alleged and proved. *United States* v. *Bohonus*, *supra*.[3]

The decision below does not, as petitioner asserts, conflict with decisions of other courts of appeals. The cases on which petitioner relies for his claim of conflict (*United States* v. *Dixon*, 536 F. 2d 1388 (2d Cir. 1976), *United States* v. *McNeive*, 536 F. 2d 1245 (8th Cir. 1976), and *United States* v. *Rabbitt*, 583 F. 2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979)) all adhere to the principle that, as *Dixon* phrases it, "a scheme to use a private fiduciary position to obtain direct pecuniary gain is within the mail fraud statute." 536 F. 2d at 1399; see also *United States* v. *McNeive*, *supra*, 536 F. 2d at 1249; *United States* v. *Rabbitt*, *supra*, 583 F. 2d at 1025. A violation of the mail fraud statute was held not to have been established in *Dixon* because the scheme at issue—unlike the one involved in this case—contemplated neither pecuniary loss to anyone *nor* direct pecuniary gain to the defendant. See 536 F. 2d at 1399; see also *id.* at 1400-1401. In *McNeive*, the mail fraud statute was held not to have been violated because the defendant did not receive—as in this case—kickbacks in reward for the exercise of his discretionary judgment, but rather received only unsolicited gratuities for his exercise of a ministerial duty. See 536 F. 2d at 1250, 1251. The mail fraud conviction in *Rabbitt* was reversed because the actions for

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[3]The jury was instructed that, if it found that petitioner had accepted monies and kickbacks from Mutual, it could find that he had engaged in a scheme to defraud Safeway of his loyal and faithful services, even though no actual monetary loss to Safeway was shown (see Pet. 16 n.3). A finding that petitioner had accepted kickbacks, however, was of necessity a finding that he had defrauded Safeway of his secret profits and hence had caused the company tangible loss.

which the defendant received remuneration were not—as here—undertaken in his official capacity (see 583 F. 2d at 1024-1026); on one other mail fraud count, involving payments to the defendant for action he did take in his official capacity, his conviction was upheld. See *id.* at 1022-1023.

2. The mailings charged by the indictment to be in furtherance of the fraudulent scheme fell into three categories: written confirmations of the sale of meat through Mutual to Safeway, sent by Mutual to suppliers; statements detailing Mutual's brokerage commission charges on sales to Safeway, sent by Mutual to suppliers; and checks in payment thereof sent by suppliers to Mutual (Pet. App. A5). Petitioner claims (Pet. 17-22) that the link between these mailings and the scheme was too attenuated to sustain his conviction; and the dissent in the court of appeals was based upon this point (Pet. App. A10). As the court of appeals majority correctly pointed out (*id.* at A6-A8), however, the essence of the ~~scheme~~ scheme was that petitioner would direct Safeway business to Mutual and receive a kickback from Mutual's profits thereon. The mailings, which were ordinary business practices of a meat broker, were therefore a foreseeable result of and an essential part of the scheme. Without them, Mutual would have been unable to collect its brokerage profits and, accordingly, would have had neither the funds with which to pay kickbacks to petitioner nor any incentive to make such payments. The mailings simply were not remote from the fraudulent

scheme in the same fashion as those found insufficient to sustain the convictions in the decisions on which petitioner relies (Pet. 19-22).[4]

3. The district court admitted, for the purpose of showing motive and intent, evidence that, sometime subsequent to the initiation of the kickback scheme between petitioner and Mutual, petitioner offered to steer Safeway business to another brokerage firm in return for part of the brokerage commissions. For the reasons set forth by the court of appeals (Pet. App. A8-A9), the admission of this evidence was not an abuse of discretion.[5]

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[4]In *Parr* v. *United States*, 363 U.S. 370 (1960), and *United States* v. *Tarnopol*, 561 F. 2d 466 (3d Cir. 1977), the mailings (in *Parr*, assessment notices, tax bills and tax payments; in *Tarnopol*, packing slips) would have occurred even had there not existed, in each case, a fraudulent scheme to misappropriate the funds to which the mailings related. Here, Mutual's business dealings with Safeway were substantially a product of the fraudulent kickback scheme and the mailings thus would otherwise not have occurred. In *Kann* v. *United States*, 323 U.S. 88 (1944), the mailings were from the bank that cashed the fraudulently procured checks to the bank upon which the checks were drawn, for the purpose of collection. Neither bank was a party to the fraud, and the mailings occurred after the defendants had procured the proceeds of the fraud; the mailings thus were of no assistance in consummating the fraud. Here, the mailings were from or to Mutual, a party to the fraud, and were steps in the collection by Mutual of funds out of which petitioner received his share.

In *United States* v. *Brown*, 583 F. 2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), the mailings by a finance company of a repayment coupon book to a borrower and of a subsequent letter telling him that a new book would be issued to him were totally tangential to the scheme to defraud the finance company by a false loan application and to defraud the borrower into making a spurious investment (see 583 F. 2d at 665-668); conviction on another count was, on the other hand, upheld where the defendants mailed a request for financing with the intent to embezzle the proceeds of the sale of the items financed. *Id.* at 668-669.

[5]Petitioner argues (Pet. 22) that the court of appeals found no abuse of discretion because it misread the record and erroneously thought that the kickback scheme was initiated by him rather than by

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
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Attorney

JUNE 1980

Mutual. The relevance of the evidence concerning the offer to the other firm remains the same, however, regardless of who initiated the scheme for which petitioner was tried.

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Supreme Court, U. S.
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No. 79-1672

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

JOHN L. LEA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES

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No. 79-1672

IN THE

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OCTOBER TERM, 1979

JOHN L. LEA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES

ARGUMENT

I.

REPLY TO THE GOVERNMENT ON THE FRAUD ISSUE

A.

While the Government states that tangible loss is not an essential element of mail fraud, nevertheless it argues pecuniary injury by asserting that Safeway was entitled to the monies allegedly received by petitioner[1] and that these payments inevitably increased Safeway's purchasing costs. These arguments do not demonstrate tangible monetary injury.

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1. Safeway policy provided that the company *may* require an accounting of gratuities received. Additionally, the company conflict of interest statement was signed on October 15, 1969 and covered the *preceding* five years. The mailings charged in the indictment all occurred in 1974 and 1975. (Petitioner's Brief and Appendix, pages 8 and 9, A13-20.)

With regard to Safeway's right to the sums allegedly paid petitioner by Petlin and Horwich, aside from the cases in the political corruption arena, the mail fraud statute has been construed as prohibiting schemes which seek to entice the victim of the fraud to transfer something of economic value to the defendant. *Miller* v. *United States* (Seventh Circuit, 1909), 174 F. 35, 39. Although the indictment identifies Safeway as the victim of a supposed scheme, neither the indictment nor the proof submitted at trial define any tangible commodity transferred by it to petitioner or any other individual identified as a participant in the fraud. With regard to the supplies purchased for Safeway, it has never been contended that as a consequence of any scheme Safeway did not receive exactly the supplies it needed at costs determined by the market. Petitioner's alleged enrichment came directly from Petlin and Horwich. Presumably, these individuals were neither deceived nor defrauded.[2]

The Government's second argument, that payments to a purchasing agent must cause higher costs to the purchaser, while neither alleged in the indictment or established at trial, does not take into consideration the prosecution's admission that petitioner always got the very best price he could for Safeway, that he never bought at higher prices, and that all commissions earned by Mutual, including commissions on sales to Safeway, were legitimate. (T. 537-560) The price and quality of the merchandise purchased by petitioner was always appropriate to *market* conditions and Safeway's needs. (T. 103, 282, 384, 425) He never bought at a higher price from Mutual.

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2. During closing arguments to the jury the prosecution stated, "We are not here, make no doubt about it, we are not here because he got a turkey at Thanksgiving. . . ." (T. 542) Petitioner allegedly received money from Petlin and Horwich. Could the Government argue that Safeway suffered tangible pecuniary injury and loss cognizable under the mail fraud statute if petitioner had allegedly received food or tickets to ball games, or been treated to elegant dining at fancy restaurants or golf or tennis at exclusive clubs?

(T. 111) When the price and quality of the product offered by Mutual was not appropriate, petitioner would not accept Mutual's offerings. (T. 238-239) On this record, it has never been demonstrated or contended that Safeway could have purchased its supplies at *less* than the prevailing cost established by the market. On this record, whether Safeway purchased its supplies through Mutual or others, its cost would be the same.[3]

B.

Petitioner has argued that the concept that a Section 1341 prosecution may be maintained in the context of a breach of duty and receipt of secret profits where loss has not been sustained and where injury has not been contemplated involves extension of doctrines evolved to prosecute public political

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3. In both *United States* v. *George* (Seventh Circuit, 1973) 477 F. 2d 508, cert. denied 414 U. S. 827 and *United States* v. *Hasenstab* (Second Circuit, 1978) 575 F. 2d 1035, cert. denied 439 U. S. 827, defendant made his agreement directly with the supplier. Additionally, in both cases defendants were paid pursuant to a percentage of sales. The price of the goods was not determined by market conditions and it was successfully argued that except for the agreement the company could have negotiated a lower price for the product it was buying, that is, arguably, the supplier would have accepted a price for goods equal to his net receipt after the money payment to the purchasing agent. On the nexus point, if the agreement provides for a percentage payment to the agent, the monies paid to the agent reflect his share on each transaction.

None of these elements are present in the instant case. The record is silent as to the authority of Mutual to set prices with its client suppliers. Petitioner was allegedly paid by the brokers out of the commissions they received. Safeway paid the suppliers directly. In view of the Government's admissions at trial, the price was determined by market conditions and not by the suppliers, Mutual or petitioner. Petitioner was never paid pursuant to any formula or percentage agreement.

figures under the mail fraud statute.[4] Petitioner argued that these precedents ought not to be extended into private relationships. The Government challenges this argument by asserting that the deprivation of an employer of the honest and faithful services of an employee and receipt by the employee of secret profits is sufficient to warrant conviction under the statute.[5]

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4. The comment by Mr. W. Robert Gray, "The Intangible—Rights Doctrine and Political—Corruption Prosecutions Under the Federal Mail Fraud Statute," scheduled to appear in 47 *U. Chi. L. Rev. ....., No. 3* (Spring 1980), questions the historical and precedential foundations of the development of this doctrine. As the scheduled publication date of this article is late August, 1980, it is reproduced as Appendix E. The article has not been fully edited or corrected and appears in the Brief in the form submitted by the editors.

5. The instant opinion also departs from other precedents. Prior to the decision in this litigation, the Seventh Circuit had mantained that neither breach of fiduciary duty nor receipt of secret profits were alone sufficient to constitute violation of the mail fraud statute. *United States* v. *Bush* (1975), 522 F. 2d 641, 648, cert. denied 424 U. S. 977; *George* cited supra in footnote 3 at page 512; see also *United States* v. *McNeive* (Eighth Circuit, 1976), 536 F. 2d 1245, 1251 footnote 12. To establish the offense, additionally required were material misrepresentations and active concealment. *Bush* at page 648. In each instance, with the exception of the political corruption cases decided in this Circuit, the victim of the fraud had suffered actual tangible pecuniary loss and injury.

To the extent the statute required breach of duty, profit at the expense of the victim, misrepresentation and concealment, each of the cases cited by the Appellate Court and the Government contained one or more of these elements. (Petitioner's Brief, page 15 footnote 2) Thus in *Ohrynowicz* v. *United States* (1976), 542 F. 2d 715, cert. denied 429 U. S. 1027, the mailed material contained false information. In *United States* v. *Louderman* (Ninth Circuit, 1978) 576 F. 2d 1383, cert. denied 439 U. S. 896, defendants acknowledged their active misrepresentation to secure confidential information. In *Abbott* v. *United States* (Fifth Circuit, 1956), 239 F. 2d 310, purloined maps and payment for this product was sent

(Footnote continued on next page.)

In private relationships more than mere breach of duty and receipt of secret profits is required to sustain conviction under the statute. In the instant case, pecuniary loss or the attempt to cause tangible harm to Safeway has not been demonstrated. None of the monies allegedly paid petitioner were sent in the mails. No misrepresentation or falsity was contained in any of the confirmations, brokerage statements or supplier checks. Where conduct neither contemplates nor causes any tangible loss or injury, federal criminal statutes ought not be applied to aid any business in the management of the loyalties of its employees.

II.

REPLY TO THE GOVERNMENT ON THE NEXUS ISSUE

In the original Brief, petitioner submitted that each transaction alleged in each count of the indictment, that is, each use of the mails, must be proximately connected to an element of the scheme defined by the Appellate Court. That Court specifically identified the fraud as follows:

1. Petitioner's disclosure of competitor offers or Safeway's anticipated future requirements; or
2. Petitioner's directing Mutual to specific suppliers that he believed would allow Mutual to offer a more competitive price; or
3. Petitioner's rejection of offers similar in price and quantity to those tendered directly by suppliers and subse-

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through the mail. In *United States* v. *Bohonus* (Ninth Circuit, March 27, 1980) No. 79-1449, petition for certiorari pending, the kickbacks were sent directly in the mails. Finally, with regard to *Bohonus* that opinion states:

> "Neither breach of fiduciary duty, nor receipt of secret profits, then, would suffice, standing alone, to show a § 1341 violation; there must be a recognizable scheme formed with intent to defraud. [Citing cases.]"

> quently accepted when placed through Mutual. (Petitioner's Appendix A, page A3.)

To warrant conviction for mail fraud under this scheme, petitioner proposed a definition of "nexus". Quite simply, petitioner argued that each count of the indictment must be directly related to one or more of the elements of the fraud defined by the Court. This has never been demonstrated. The Government does not challenge either the definition of nexus submitted by petitioner nor does it argue that any use of the mails is connected either to petitioner or any element of the scheme found by the Appellate Court.

Irrespective of the inherent propriety of each use of the mails alleged in the indictment and irrespective of any demonstrable connection of any use of the mails with any illegal activity, the Government condemns every mail use by Mutual and its supplier clients. Under this logic, the Government is essentially proposing that *any* use of the mails, irrespective of its contents, irrespective of its purpose, and despite its sheer innocence, is sufficient to constitute a mail fraud offense. Consequently, individual mailings need not be scrutinized for their connection with petitioner or with any illegal activity. Every time Mutual sent any confirmation, or brokerage statement, and every time any supplier sent any check to Mutual, petitioner was guilty of mail fraud whether or not he was connected in any way to the transaction evidenced by any of these documents, whether or not he benefited in any way from any transaction and whether or not he was even employed by Safeway at the time of any transaction.[6]

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6. Petitioner was convicted on all twenty counts of the indictment. The last alleged payment by Petlin and Horwich occurred on approximately August 25, 1974. (T. 134-136, 180, 209-211, 310, 318, 334-335, 351.) Petitioner was discharged by Safeway on February 20, 1975. (T. 76) In this context, five counts of the indictment charged mail use after the last payment was allegedly made to petitioner. Of these, one count charged mail use after petitioner was discharged. (Indictment, Appendix D, page A19, speci-

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Petitioner has never accepted that either the indictment or the evidence adduced at trial established the scheme to defraud defined by the Appellate Court.[7] Nexus, in the context of that scheme, has not been established. Under the rationale of the Court, a precise connection between each use of the mails, that is each count of the indictment, and the scheme proposed by the decision is not necessary. The Government's Brief reiterates this position. That rationale has been challenged in petitioner's original Brief, and petitioner here repeats and reasserts his original arguments. The following discussion responds to the Government's added arguments.

A.

The Government states that the mailings charged in the indictment would not have occurred had there been no scheme. While the record is silent on this point, over the period of time alleged in the indictment, perhaps hundreds of offers were submitted by Mutual to Safeway. Assumedly, hundreds of these offers were accepted for Safeway by petitioner *and other buyers* in his office. The Government essentially argues, without any foundation in the record as to any transaction, that each offer was tainted with the scheme defined by the Appellate Court. Throughout the course of this litigation not even one stained transaction has ever been identified in either the opinion of the Seventh Circuit or any Government Brief.

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fically counts 14 through 18.) With regard to these precise counts, the Government maintains a discreet silence.

7. Both Petlin and Horwich testified for the Government under immunity. Their testimony does not support the Government's factual statement. Monies were allegedly paid to petitioner for Mutual business. (T. 135, 310) These witnesses did not testify that monies were paid for information of any kind nor did they identify the scheme found by the Court. The suppliers testifying for the prosecution did not specify any date, participant or transaction connected with the scheme defined in the opinion.

The Government argues that *but for* the scheme Mutual would have been unable to sell to Safeway and therefore none of the mailings alleged in the indictment would have occurred. Safeway did not prohibit the use of brokers.[8] Mutual was in the meat brokerage business. Both Petlin and Horwich were experienced brokers. Both knew the market. Safeway was not their only client. To suggest that Mutual was incapable of tendering proper offers and selling to Safeway without petitioner assumes the business incompetence of Petlin and Horwich. The record belies any such assumption.[9] Arguably, if payments were made to petitioner, it is reasonable to conclude that Mutual sales to Safeway increased. However, even under this view of the case, none of the transactions evidenced by the mailings alleged in the indictment contained any false pretense or misrepresentation. None of the offers submitted by Mutual were padded, excessive or in any manner inflated to provide for any payment to petitioner. In all respects, the contracts negotiated by Mutual with Safeway for its client suppliers represented legitimate obligations by the respective parties. Intrinsically innocent, the mailings charged in the indictment represented a perfectly proper routine procedure in aid of the conduct of business between Safeway, Mutual and the suppliers. The *purpose* of the confirmations, brokerage statements and supplier checks was entirely lawful. These documents cannot support the conviction for mail fraud.

B.

In its final point, the Government argues that the mailings were steps in the collection by Mutual of funds out of which

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8. Safeway's policy with regard to brokers is set out at page 9 of Petitioner's Brief.

9. The record supports the proposition that Petlin and Horwich initially approached petitioner. Thereafter they alone determined what, if anything, they allegedly were to pay to him. (147-149, 198-200, 213-214, 225-228, 313-314, 322, 325-331, 337-339.) None of these alleged payments have ever been connected to any specific transaction.

petitioner received his share. In other words, *but for* the mailings Mutual would not have received the funds with which to pay petitioner. The Government intimates that petitioner was allegedly paid pursuant to a formula or percentage based on Safeway business or from an account maintained by Mutual where only commissions on sales to Safeway were deposited.[10] Petitioner was never paid pursuant to any set agreement nor at any set time nor from any special account (Petitioner's Brief pages 9-11.) Additionally, the Government now appears to argue that petitioner was allegedly paid after the mailings alleged in the indictment. Unquestionably, there is nothing in the record to indicate that any sums were ever allegedly paid to petitioner unless and until commissions were received by Mutual. In *United States* v. *Maze* (1974) 414 U. S. 395, 402, the Court concluded that if the fraud is complete before use of the mails, subsequent mailings cannot establish the crime of mail fraud. Concomitantly, mail uses occurring before the fraudulent scheme begins cannot constitute a use of the mails for the purpose of executing the fraud. *United States* v. *Beall* (D. C. Calif., 1954) 126 F. S. 363, 365-366; *United States* v. *Staszcuk* (Seventh Circuit, 1974) 502 F. 2d 875, 880-881, *modified in banc on other grounds* 517 F. 2d 53, *cert. denied* 423 U. S. 837; See also *Kann* v. *United States* (1944) 323 U. S. 88, 95. In other words, assuming that the parameters of the scheme were properly identified by the Appellate Court, the purpose of the fraud was the exchange of price information, or the direction of suppliers to Mutual, or the rejection of offers by suppliers not associated with Mutual. Nothing in the evidence connects the contents of any mailed document with any of these elements. If this was the scheme, it was completed when the information, direction or rejection occurred. The subsequent mailings alleged in the indictment are too remote to justify conviction under the statute. *Maze, supra.* If, on the other hand, the transactions evidenced by the mailings had to be complete

10. See note 3 at page 3 of this Brief.

before petitioner was allegedly paid anything, and as the mailings were not shown to contain any falsity or misrepresentation, the fraudulent scheme, that is the alleged payments to petitioner, did not occur until after the use of the mails was complete. *Staszcuk supra* and *Beall supra.* None of the alleged payments were sent or received in the mails. In either case, the mailings alleged in the indictment were not made in furtherance of any scheme to defraud.

CONCLUSION

For the reasons stated herein and in the original Brief, Petitioner prays that the Court grant his petition for a writ of certiorari.

Dated: July 1980

Respectfully submitted,

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APPENDIX

APPENDIX E

The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute

In recent years, federal prosecutors and courts have used the federal mail fraud statute, section 1341 of Title 18,[1] to combat political corruption at state and local levels.[2] The greatly pub-

1. 18 U. S. C. § 1341 (1976). *See* note 5 *infra.*

2. In many of these cases, convictions were based on conventional concepts of fraud. *See* Parr v. United States, 363 U. S. 370 (1960) (convictions reversed); United States v. Rauhoff, 525 F. 2d 1170 (7th Cir. 1975); United States v. Bush, 522 F. 2d 641 (7th Cir. 1975), *cert. denied,* 424 U. S. 977 (1976); United States v. Barrett, 505 F. 2d 1091 (7th Cir. 1974), *cert. denied,* 421 U. S. 964 (1975); United States v. Staszcuk, 502 F. 2d 875 (1974), *rev'd in part on rehearing,* 517 F. 2d 53 (7th Cir.), *cert. denied,* 423 U. S. 837 (1975); Bradford v. United States, 129 F. 2d 274 (5th Cir.), *cert. denied,* 317 U. S. 683 (1942); Leche v. United States, 118 F. 2d 246 (5th Cir.), *cert. denied,* 314 U. S. 617 (1941); Shushan v. United States, 117 F. 2d 110 (5th Cir. 1941), *cert. denied,* 313 U. S. 574 (1942). In other cases, convictions were based on an expansive interpretation of fraud in the context of political corruption where citizens were said to have been deprived of certain intangible rights. *See* United States v. Mandel, 591 F. 2d 1347 (4th Cir.), *conviction aff'd in relevant part on rehearing,* 602 F. 2d 658 (4th Cir. 1979) per curiam, *cert. denied,* 100 S. Ct. 1647 (1980); United States v. Rabbit, 583 F. 2d 1014 (8th Cir. 1978) (convictions arguably based on expansive interpretation of fraud, *cert. denied,* 439 U. S. 1116 (1979); United States v. McNeive, 536 F. 2d 1245 (8th Cir. 1976) (expansive interpretation of fraud adopted in dictum; convictions reversed); United States v. Brown, 540 F. 2d 364 (8th Cir. 1976); United States v. Keane, 522 F. 2d 534 (7th Cir. 1975), *cert. denied,* 474 U. S. 976 (1976); United States v. Isaacs, 493 F. 2d 1124 (7th Cir.), *cert. denied,* 417 U. S. 909 (1974); United States v. Fraser, 303 F. Supp. 380 (E. D. La.

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licized convictions of the former governors of Illinois[3] and Maryland[4] were obtained under that section. The language of the statute,[5] however, does not specify political corruption as a target of its proscription. Rather, it uses general terms to prohibit "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." These words, the subject of extensive ju-

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1969) (expansive interpretation of fraud adopted in dictum); United States v. Randle, 39 F. Supp. 759 (W. D. La. 1941) (no convictions). It is this latter group of cases—adopting the intangible-rights theory in their expansive definition of fraud—which this comment analyzes.

3. United States v. Isaacs, 493 F. 2d 1124 (7th Cir.), *cert. denied,* 417 U. S. 976 (1974). Otto Kerner, the former governor, was a judge on the United States Court of Appeals for the Seventh Circuit at the time of his conviction.

4. United States v. Mandel, 591 F. 2d 1347 (4th Cir.), *conviction aff'd in relevant part on rehearing,* 602 F. 2d 653 (4th Cir. 1979) (per curiam), *cert. denied,* 48 U. S. L. W. 3662 (U. S. Apr. 14, 1980) (Nos. 79-1029, 79-1030).

5. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, or any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U. S. C. § 1341 (1976).

dicial construction,[6] have provided the statutory basis for punishing certain forms of fraudulent public conduct.

Outside of the arena of the political-corruption, the mail fraud statute has generally been construed as prohibiting schemes in which the victim of the fraud has transferred something of economic value to the defendant.[7] Beginning with United States v. States[8] in 1973, three circuits—the Seventh,[9] Fourth,[10] and Eighth[11]—have applied section 1341 to situations in which corrupt politicians did not deprive the citizens of anything of economic value. Their crime was said to consist of defrauding citizens of their rights to honest government. That an official may now be convicted of a section 1341 violation when his purported scheme to defraud has as its sole object the intangible and abstract political and civil rights of the general citizenry is perhaps the most important development in the history of the mail fraud statute.[12] In reaching their decisions,

6. United States v. McNeive, 536 F. 2d 1245, 1247-48 (8th Cir. 1976).

7. *See* text and notes at notes *infra.*

8. 488 F. 2d 761 (8th Cir. 1973), *cert. denied,* 417 U. S. 909 (1974).

9. *See* United States v. Keane, 522 F. 2d 534 (7th Cir. 1975), *cert. denied,* 474 U. S. 976 (1976); United States v. Isaacs, 493 F. 2d 1124 (7th Cir.), *cert. denied,* 417 U. S. 976 (1974).

10. United States v. Mandel, 591 F. 2d 1347 (4th Cir.), *conviction aff'd in relevant part on rehearing,* 602 F. 2d 653 (4th Cir. 1979) (per curiam), *cert. denied,* 48 U. S. L. W. 3662 (U. S. Apr. 14, 1980) (Nos. 79-1029, 79-1030).

11. *See* United States v. Brown, 540 F. 2d 364 (8th Cir. 1976); United States v. McNeive, 536 F. 2d 1245 (8th Cir. 1976) (dictum); United States v. States, 488 F. 2d 761 (8th Cir. 1973), *cert. denied,* 417 U. S. 909 (1974).

12. This development has been observed by two prior commentators. Note, *A Survey of the Mail Fraud Act,* 8 MEM. ST. U. L. REV. 673, 679-80 (1978); Comment, *Survey of the Law of Mail Fraud,* 1975 U. ILL. L. F. 237, 246-48.

these courts have relied on the broad language of section 1341,[13] prior Supreme Court decisions,[14] and other case law construing section 1341.[15]

This comment addresses the question whether section 1341 properly reaches political corruption depriving citizens of their intangible rights to honest government. First, it reviews the schemes that have been held illegal under section 1341 in political-corruption cases. The comment then analyzes the statute, the legislative history, the meaning of "fraud" in the nineteenth century, and the prior case law, and concludes that section 1341 should not be read to extend to political-corruption cases.

I. Fraudulent Schemes Involving Citizens' Intangible Rights

United States v. *Isaacs*[16] and *United States* v. *Mandel*[17] illustrate the type of scheme involved in the intangible-rights cases.

13. *See, e.g.*, United States v. Mandel, 591 F. 2d at 1360; United States v. States, 488 F. 2d 761, 763-64 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974).

14. *See, e.g.*, United States v. Mandel, 591 F. 2d at 1360; United States v. Isaacs, 493 F. 2d 1124, 1150 (7th Cir.), *cert. denied*, 417 U. S. 976 (1974).

15. *See, e.g.*, United States v. Mandel, 591 F. 2d at 1359-62; United States v. States, 488 F. 2d 761, 764-66 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974).

16. 493 F. 2d 1124 (7th Cir. 1974), *cert. denied*, 417 U. S. 976 (1974).

17. 591 F. 2d 1347 (4th Cir. 1979). The jury convicted Mandel. The court of appeals affirmed with respect to the theory of the crime, but remanded on account of trial error. 591 F. 2d 1347 (4th Cir. 1979). In a rehearing en banc, a majority of the court upheld the ruling of the trial court as to the theory of the crime, and an equally divided court affirmed the district court on the question of trial error, and so reinstated the conviction. 602 F. 2d 653 (4th Cir. 1979), *cert. denied*, 48 U. S. L. W. 3662 (U. S. Apr. 14, 1980) (Nos. 79-1029, 79-1030).

In *Isaacs,* the former governor of Illinois, Otto Kerner, and his close political associate. Theodore Isaacs, were convicted under section 1341 of using the mails to defraud "the State of Illinois and its citizens of the honest and faithful services of Kerner as governor."[18] The receipt of bribes provided the factual basis for the prosecution's theory of fraud.[19] Kerner, acting through Isaacs, arranged to purchase race track stock at below-market prices from the wealthy owner of Chicago-area racing interests, in return for his agreement to promote those interests before the state racing board and the state legislature. Although both Kerner and Isaacs made substantial monetary gains on their receipt of the stock,[20] there was no direct monetary loss to the state on the transaction. Indeed, state revenues from horse racing actually increased during the period in which Kerner was promoting the interests of the person from whom he had purchased the stock.[21]

The defendants' enrichment came directly from the person who advanced them the putative bribe—a person who was neither deceived nor defrauded.[22] For whatever reason, Illinois authorities chose not to bring state charges for receiving bribes. Instead, the federal authorities—relying on the fact that Isaacs and Kerner made several mailings in connection with the scheme[23]—

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18. 493 F. 2d at 1149.

19. *Id.* at 1146, 1149.

20. *Id.* at 1139.

21. *Id.*

22. The race track owner who advanced the bribes, Mrs. Majorie L. Everett, was named as an unindicted coconspirator for her role in the transaction and served as a principal witness for the prosecution at the trial. *Id.* at 1131-32.

23. For example, Isaacs and Kerner devised the pretext of a fictitious loan to make it appear as if they had purchased the stock in question four years before they really obtained it. Under this pretext, the gain they made on the stock transaction would not have

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brought charges of mail fraud. To make the conduct involved fit within any arguable concept of fraud, the federal authorities had to turn to the intangible-rights theory.

The citizens of Illinois were the only persons even conceivably deceived or defrauded by the governor's conduct.[24] Since they relinquished nothing of economic value, it was only by asserting that they had been deprived of certain intangible political rights that they could be called victims of any fraudulent scheme.

In *United States* v. *Mandel*,[25] the defendant, Marvin Mandel, governor of Maryland, was—along with his codefendants—convicted under section 1341 of devising a scheme "to defraud the citizens of the State of Maryland and her governmental departments, agencies, officials and employees . . . of the right to conscientious, loyal, faithful, disinterested and honest government through bribery and non-disclosure and concealment of material information."[26] Like Kerner, Mandel became the sub-

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appeared so abrupt and obvious. To complete the fiction, "interest" was paid on this bogus loan, and Kerner mailed an Internal Revenue Service form to the supposed lender to notify her that she had been reported as receiving this "interest." This mailing provided the basis of one of the mail fraud counts in the indictment. *Id.* at 1137.

24. *Id.* The defendants were also convicted of "defrauding the racing associations of Illinois of the right to obtain racing dates free from corruption and bribery." *Id.* at 1149. But it appeared from the record that no competitor of the racing interests lost racing dates as a result of the scheme. *Id.* at 1139.

25. 591 F. 2d 1347 (4th Cir.), *conviction aff'd in relevant part on rehearing*, 602 F. 2d 653 (4th Cir. 1979) (per curiam), *cert. denied*, 48 U. S. L. W. 3662 (U. S. Apr. 14, 1980) (Nos. 79-1029, 79-1030).

26. 591 F. 2d at 1359-60. The indictments also charged the defendants with "directly and indirectly" obtaining money. *Id.* at 1353. But the court of appeals indicated that it affirmed the theory of the crime in *Mandel* solely on the basis of the intangible-rights doctrine. *Id.* at 1359-60, 1359 n. 6.

ject of federal criminal prosecution in connection with an alleged scheme to promote racetrack interests.[27] In 1972, Governor Mandel had supported certain racetrack legislation then in a critical stage of enactment before the Maryland General Assembly. The legislation became law, did it then became known that the law favored the interests of a group of racetrack investors that included friends and business associates of the governor—some of whom had given valuable personal property as well as business interests to Mandel.[28] Although Mandel denied having knowledge that the legislation would favor this group, the court of appeals held that his conviction of mail fraud was possible because his conduct amounted to either bribery or concealment of material information and that such conduct was proscribed by section 1341.[29] As in *Isaacs,* Mandel's actual enrichment did not flow directly from anyone Mandel even arguably defrauded or deceived. It was, therefore, necessary to resort to what amounts to a constructive theory of fraud, by finding that Mandel's alleged involvement in bribery and nondisclosure of material facts fraudulently deprived citizens of their right to honest government.

II. Construction of the Mail Fraud Statute

Section 1341 prohibits "any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent

27. The circumstances in *Mandel* were far more subtle than those in *Isaacs.* Unlike the situation in *Isaacs,* all the principals in the alleged fraudulent scheme in *Mandel* were prosecuted, and the case against them consisted of indirect evidence. As the court of appeals stated, "It is . . . apparent that the case could not have been submitted on the theory that Governor Mandel had a direct interest in the race track business, for no direct connection on his part was either alleged or proven." *Id.* at 1364.

28. Mandel received some clothing for himself and jewelry for his wife. In addition, he was assigned interests in real estate. *Id.* at 1356-57.

29. *Id.* at 1360, 1363, 1365.

pretenses, representations, or promises."[30] Whether this provision proscribes schemes to deprive citizens of their intangible rights as well as schemes "for obtaining money or property" depends on the meaning of "any scheme or artifice to defraud." Both the legislative history[31] and the meaning of the word "fraud" in the nineteenth century[32] indicate that the statute only reaches schemes that have as their goal the transfer of something of economic value to the defendant.[33]

A. Legislative History

1. *The Origins of the Statute.* The current section 1341 originated in section 301 of the Act of June 8, 1872,[34] an act which consolidated and recodified the postal laws. Although it was enacted as part of a general recodification, section 301 was original legislation and had no predecessor.[35] This statute proscribed "any scheme or artifice to defraud," language which is retained in section 1341 today.[36]

The postal legislation, of which the mail fraud statute constituted a part, was in large part the work of a commission appointed under congressional authority to revise and consolidate the postal laws,[37] and of a committee of postal officials which

30. *See* note 5 *supra.*

31. *See* text and notes at notes ..... *infra.*

32. *See* text and notes at notes ..... *infra.*

33. Most courts have concluded that the legislative history is too scanty to be of much help in construing section 1341. *See, e.g.*, United States v. McNeive, 536 F. 2d 1245, 1248 (8th Cir. 1976).

34. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

35. *See* M. BEAMAN & A. MCNAMARA, INDEX ANALYSIS OF THE FEDERAL STATUTES, 1789-1873, at 525, 546 (1909).

36. *See* note 5 *supra.*

37. The commission was created by the Act of June 27, 1866, 14 Stat. 74.

then revised the Postal Code proposed by the commission.[38] The Postal Code prepared by the commission did not mention "scheme to defraud." The committee of postal officials, noting this omission and concerned that current law did not adequately protect citizens from frauds conducted through the mails, added a section to the Code so that "power [might] be given to the officers of the [post office] department to prevent the operation of lottery gamblers throughout the postal service."[39] Congress adopted the substance of this recommendation in section 149[40] of the Act of 1872, and also enacted two other sections dealing with fraud, section 300[41] and section 301,[42] the latter being the predecessor of the current section 1341.

The rationale for the enactment of section 301 was essentially the same as that for other antifraud provisions of the 1872 Act. The committee of postal officials, as indicated before, predicated their recommendation for new fraud legislation on the need "to prevent the frauds which are perpetrated by lottery swindlers through the mails"[43] and drafted section 149, which made it illegal for anyone to mail "letters or circulars concerning . . . lotteries . . . or other similar . . . schemes devised . . . to deceive and defraud the public for the purpose of obtaining money under

38. *See* H. R. EXEC. DOC. NO. 1, PT. 3, 41st Cong., 3d Sess. 25 (1870).

39. Brief for Petitioner at 25-26, Fasulo v. United States, 272 U. S. 620 (1962) (quoting Report of Committee of Post Office Officials 19-20 (March 30, 1870).

40. Act of June 8, 1872, ch. 335 § 149, 17 Stat. 302 (repealed 1909).

41. *Id.*, § 300, 17 Stat. 322 (current version at 39 U. S. C. § 3005 (1976)).

42. *Id.*, § 301, 17 Stat. 323 (current version at 18 U. S. C. § 1341 (1976)).

43. Brief for Petitioner at 25-26, Fasulo v. United States, 272 U. S. 620 (1962) (quoting Report of Committee of Post Office Officials 19-20 (March 30, 1870)).

false pretences."[44] Section 149, as drafted by the postal commission, reached neither the principals of the scheme nor fraudulent schemes to obtain property rather than money.[45] Congress filled this gap by adding section 301.

Section 301 reached the principals, not just those who did the mailing, of schemes described in section 149.[46] It did not prohibit or restrict only fraudulent schemes involving money, as did the literal words of section 149, but was phrased in more general language to proscribe "any scheme or artifice to defraud." Congressman Farnsworth of Illinois, House sponsor of the recodification legislation, explained that sections 300 and 301 were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purposes of deceiving and fleecing the innocent people in the country."[47] This background suggests that Congress in the fraud legislation of 1872 did not use the term "fraud" in some new and technical way, but rather intended to prohibit schemes that were within the conventional usage of the term and involved use of the federal mails. There is, moreover, no suggestion that Representative Farnsworth intended to proscribe any form of trickery or deception other than schemes to acquire the property of others.

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44. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302 (repealed 1909).

45. *Id.*

46. Section 149 provided that "it shall not be lawful to convey by mail" matter designed to promote fraudulent schemes. *Id.* Section 301 was aimed directly at "any person [who] devised . . . any scheme or artifice to defraud" that involved the mails. *Id.* § 301.

47. CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). Representative Farnsworth's remarks came during the course of debate on H. R. 2295, the recodification bill introduced in the forty-first Congress. Failing to pass in that Congress, the recodification legislation—containing intact the sections on fraud—was reintroduced as H. R. 1 in June 8, 1872, ch. 335, 17 Stat. 283 (codified in scattered sections of 39 U. S. C. (1976)).

2. *The 1889 Amendment.* In 1889, Congress amended the mail fraud statute by adding specific prohibitions against schemes dealing in "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," or "green cigars."[48] The history of the amending legislation indicates that these terms were added at the request of postal authorities, who felt that the amendment was needed to reach certain counterfeiting schemes then prevalent.[49] This amending legislation demonstrates that the original prohibition of "any scheme or artifice to defraud" was never intended to operate as a broad prohibition of all schemes to deceive. If it had been so intended, it would not have been necessary to amend the statute in order to reach counterfeiting schemes. The amending legislation is also important in that Congress used specific, rather than general, language to reach such schemes. A statute amended in such piecemeal fashion cannot be authority for a doctrine as expansive as that of intangible rights.

3. *The 1909 Amendment.* In 1909, in the course of general revision of the federal penal code, Congress amended the mail fraud statute by adding after the original prohibition of "any scheme or artifice to defraud" the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[50] Although this amendment is of critical importance in determining whether the mail fraud statute *only* reaches schemes "for obtaining money or property," the enacting Congress apparently regarded this as an unim-

48. Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873.

49. S. REP. No. 2566, 50th Cong., 2d Sess. (1889).

50. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. There were other amendments to the statute in addition to the one indicated. All are printed without explanation in S. REP. No. 10 PT. 2, 60th Cong., 1st Sess. 238-240 (1908). Only one of these other amendments has any relevance to this inquiry. This amendment added schemes dealing in "green goods" to the list of prohibitions originally set out in 1889, *see* text at note 48 *supra.*

portant modification. Congress did not even require an explanation of the change from the sponsor of the amending legislation during the course of floor debates.[51]

The courts applying section 1341 in intangible-rights cases have relied on the original prohibition of "any scheme . . . to defraud." They have treated that language as independent of and broader than the clause added to 1909.[52] These courts thus interpret the statute as proscribing two types of conduct: "schemes . . . to defraud" *or* schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."

In *United States* v. *States*,[53] for example, the Court of Appeals for the Eighth Circuit ruled that the 1872 phrase and the 1909 phrase should be read "independently, rather than complementary of one another."[54] That is, the original expression "having devised or intending to devise any scheme or artifice to defraud" should be read as entirely independent of the later expression "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," as if the two phrases were merely "part of an uninterrupted listing

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51. *See, e.g.*, 42 CONG. REC. 1026 (1908) (remarks of Sen. Heyburn). In explaining the recodified and amended mail fraud statute, Senator Heyburn, the sponsor of the legislation, dealt with one change in the law affecting mailings made from outside the United States, noting: "I do not think there is any other change, which is not obvious upon the face of the bill, that needs any further explanation." *Id.*

52. *See, e.g.*, United States v. Mandel, 591 F. 2d at 1360; United States v. McNeive, 536 F. 2d 1245, 1247-48 (8th Cir. 1976); United States v. States, 488 F. 2d 761, 763-64 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974).

53. 488 F. 2d 761 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974).

54. *Id.* at 764.

of a series of obviously diverse schemes."[55] According to such a reading, "any scheme or artifice to defraud" would not be modified by "for obtaining money or property." In this form, the court concluded, the original 1872 language would support a theory in which the obtaining of money or property plays no essential role. This construction of the statute should, however, be rejected since the courts that adopted it did not consider the import of a crucial piece of legislative history.

The 1909 amendment was enacted without comment or debate because it merely codified the prior Supreme Court decision of *Durland* v. *United States*.[56] In *Durland*, the Court interpreted the mail fraud statute for the first time and held inapplicable a particular common-law defense. In most jurisdictions, one could not be convicted of the crime of obtaining money or property by false pretenses if he had merely made false promises. The Supreme Court held that this defense did not apply to the federal crime of mail fraud. The key language of that decision—"some schemes may be promoted through mere *representations and promises* as to the future, yet are nonetheless schemes and artifices to defraud"[57]—reappears in the language of the amendment: "representations, or promises." This change in the statute was submitted by a special commission to Congress in a modified criminal code, and the commission cited *Durland* in the margin of its report next to the revised

55. *Id.* The district court in *States* also presented an argument for reading the two phrases independently, 362 F. Supp. 1293, 1296 (E. D. Mo. 1973), relying on United States v. Young, 232 U. S. 155 (1914). But *Young* stands for the proposition that there is no essential connection between the jurisdictional requirement of a mailing and the scheme to defraud. The holding of *Young* does not address the matter in consideration here, the relation between the 1872 phrase and the 1909 phrase, because both phrases are relevant to the fraudulent-scheme element of the crime.

56. 161 U. S. 306 (1896).

57. *Id.* at 313.

mail fraud statute.[58] Thus, the 1909 amendment was designed to expand narrowly the crime of mail fraud by removing one particular common-law defense.[59]

Reading "any scheme . . . to defraud" independently of "for obtaining money or property" strips the 1909 language of any meaning.[60] If the 1909 amendment merely lists a new and

58. *See* S. Doc. No. 68, Pt. 2, 57th Cong., 1st Sess. 64 (1901) (report of the Committee to Revise and Codify the Criminal and Penal Laws of the United States). *See also* Pearce, *Theft by False Promises*, 101 U. Pa. L. Rev. 967, 980 (1953) (concluding that the 1909 amendment codified *Durland*).

59. One possible alternate explanation was offered by Chief Justice Taft in Hammerschmidt v. United States, 265 U. S. 182, 189 (1924), *discussed in* text and notes *infra*. The Chief Justice indicated that the 1909 amendment narrowed the scope of the statute after the very broad interpretation given it in Horman v. United States, 116 F. 350 (6th Cir.), *cert. denied*, 187 U. S. 641 (1902). *Horman* had extended the crime of mail fraud to reach a scheme involving pure extortion with no apparent fraud. The Chief Justice read the 1909 amendment as making it clear that the proscribed conduct must include some element of deceit or trickery. 265 U. S. at 189. This explanation is not, however, inconsistent with the thesis that the 1909 amendment codified *Durland*.

60. Such a reading would be inconsistent with several basic principles of statutory construction. "It is the duty of the court to give effect, if possible, to every word and clause of a statute." Montclair v. Ramsdell, 107 U. S. 147, 152 (1882). *See also* Mastro Plastics Corp. v. NLRB, 350 U. S. 270 (1956) (Frankfurter, J., dissenting); United States v. Menasche, 348 U. S. 528, 538-39 (1955); Wilkinson v. Leland, 27 U. S. (2 Pet.) 627, 662 (1829). Another maxim of construction requires the meaning of otherwise doubtful words to be determined by reference to associated words. *See, e.g.*, Patton v. United States, 159 U. S. 500, 509 (1895); Neal v. Clark, 95 U. S. 704, 708-09 (1877). Unless the 1909 amendment is read together with the earlier language, its meaning will be doubtful *and* it will be without effect—"an idle collection of words." Mastro Plastics Corp. v. NLRB, 350 U. S. 270, 297 (1956) (Frankfurter, J., dissenting). Such an interpretation is unacceptable,

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separate crime concerned with "obtaining money and property," as the Eighth Circuit suggested, then the amendment was unnecessary. The mail fraud statute had been used to prosecute crimes against property well before 1909.[61] Moreover, reading the two phrases independently defeats Congress's aim of codifying *Durland;* the common-law defense, under such a reading, would be available when the defendant is prosecuted for schemes to defraud rather than for schemes to obtain money or property by false or fraudulent pretenses. If, on the other hand, one treats the insertion of the phrase "for obtaining money or property" as merely serving to illustrate what was comprehended by schemes to defraud, then the words "by means of false or fraudulent pretenses, representation, or promises" apply to all schemes to defraud, and *Durland* was codified. Once the 1909 amendment is seen as the codification of *Durland,* that amendment is necessarily inconsistent with the intangible-rights theory: Congress codified *Durland's* interpretation of "any scheme or artifice to defraud" as applicable only to crimes against property.

Subsequent amendments to section 1341 have not affected its substance.[62] The intangible-rights theory is predicated on statu-

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for "[t]he cardinal principle of statutory construction is to save and not to destroy." NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 30 (1937).

61. *See* Durland v. United States, 161 U. S. 306, 312 (1896). *See also* text and notes at notes *supra.*

62. In 1948, certain colorful words used to describe fraudulent schemes were removed. *See* Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763. The House Report accompanying the amending legislation noted that this change was made to delete "the obsolete argot of the underworld" and that it, together with the elimination of other language considered to be "surplusage," was effected "without change of meaning" in the statute. H. R. REP. No. 304, 80th Cong., 1st Sess., A100 (1948). The 1949 and 1970 amendments were also of no substantive importance. *See* Act of May 24, 1949, ch. 139, § 34, 63 Stat. 89 ("dispose of" substituted for "dispose or"); Postal Reorganization Act, Pub. L. No. 91-375, § 6(j)(11), 84 Stat. 719 (1970) ("Postal Service" substituted for "Post Office Department").

tory language originally drafted in 1872 and last significantly amended in 1909. An analysis of the legislative history from this period indicates that Congress intended the statute to proscribe certain crimes against property. This construction receives additional support from the meaning of the word "fraud" at the time Congress prohibited "any scheme or artifice to defraud."

B. The Meaning of Fraud in the Nineteenth Century

In the nineteenth century, the term fraud referred to a wide variety of crimes.[63] Most frauds were prohibited by statute, but some were proscribed by only the common law.[64] And many of those frauds prohibited by the common law in America were ones originally prohibited by English statutes.[65] Even with respect to the frauds prohibited *only* by statute, courts developed so-called common-law principles of fraud as glosses upon the statutes.[66]

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63. *See generally* R. PERKINS, CRIMINAL LAW 231-33, 296-98 (2d ed. 1969).

64. For example, larceny by trick was a crime at common law. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAWS § 85, at 627 (1972).

65. One English statute, part of the common law in all American jurisdictions, prohibited obtaining property by means of a "false token or counterfeit letter made in any other Man's Name." 33 Hen. 8, ch. 1 (1541). The English false pretense statute, 30 Geo. 2, c. 24, § 1 (1757), was enacted in 1757 and is part of the common law in those American jurisdictions that incorporate English statutory and common law as of 1775. *See* W. LAFAVE & A. SCOTT, *supra* note 64, § 90, at 655 & nn.3-5 (1972).

66. *See, e.g.*, State v. Rowley, 12 Conn. 101 (1837) (using constructions of two English fraud statutes, 33 Hen, 8, c. 1 (1541); 30 Geo. 2, c. 24, § 1 (1757), as aids in construing Connecticut false-pretenses statute); People v. Clough, 17 Wend. 351 (N. Y. Sup. Ct. 1837) (in construing the New York false-pretenses statutes,

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Although courts have refused to define fraud,[67] crimes of fraud have generally been regarded as crimes against property involving some form of trickery or deception.[68] For example, in the nineteenth century, the prominent forms of fraud were embezzlement, false pretenses, forgery, and larceny by trick.[69] Each of these frauds was a crime against property.[70]

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court relied on English common-law concepts of fraud and judicial constructions of the original false-pretenses statute, 30 Geo. 2, c. 24, § 1 (1757)); People v. Stone, 9 Wend. 180 (N. Y. Sup. Ct. 1832) (using English common law and statutory law of fraud in construing state's false-pretenses statute).

Federal courts construing the mail fraud statute have considered common-law principles of fraud. *See, e.g.,* Parr v. United States, 363 U. S. 370, 400 (1960) (Frankfurter, J., dissenting) (reference to "the common-law offense of obtaining money or goods under false pretenses"); United States v. Mandel, 591 F. 2d at 1361 ("common law concepts of fraud and false pretenses").

67. *See* Blachly v. United States, 380 F. 2d 665, 671 (5th Cir. 1967); Gregory v. United States, 253 F. 2d 104, 109 (5th Cir. 1958); Weiss v. United States, 122 F. 2d 675, 681 (5th Cir.), *cert. denied,* 314 U. S. 687 (1941); Foshary v. United States, 68 F. 2d 205, 211 (8th Cir. 1933), *cert. denied,* 291 U. S. 674 (1934).

68. *See* 1 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAWS §§ 565-590 (7th ed. 1882) (major fraudulent crimes are classified as crimes against property); 2 W. RUSSELL, RUSSELL ON CRIME 1203-1501 (11th ed. J. Turner 1958) (all major crimes of fraud are listed as "offenses against property"); 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 121-22 (1883) (referring to fraud as "either actual injury or possible injury . . . by means of . . . deceit or secrecy" in a context of economic crimes). *See also* Friedman, *Intent to Defraud Reconsidered,* 1960 CRIM. L. REV. 530, 537-38 (explaining economic context of Stephen's characterization of fraud).

69. *See, e.g.,* 2 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW §§ 318-383, at 182-220 (8th ed. 1892) (embezzlement); *id.* §§ 409-488, at 235-79 (false pretenses); *id.* §§ 521-612, at 300-48 (forgery); C. KENNY, OUTLINES OF CRIMINAL LAW 206

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Thus, even if the mail fraud statute's phrase "scheme . . . to defraud" proscribes all crimes encompassed by the generic term "fraud," it reaches only certain crimes against property.

It is, however, likely that the mail fraud statute uses the term "defraud" in a specific, rather than generic, sense. Indeed, the mail fraud statute should properly be interpreted as proscribing the fraud of false pretenses. The typical false pretense statute is almost identical to section 1341 as amended in 1909.[71] In

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(1902) (larceny by trick); *id.* at 228-39 (embezzlement); *id.* at 240-51 (false pretenses); *id.* at 255-63 (forgery); 2 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 1131-51 (R. Ross & G. McClure eds. 1923) (larceny by trick); *id.* at 1304-32 (embezzlement); *id.* at 1400-78 (false pretenses); *id.* at 1505-91 (forgery).

70. *See* Primrose v. Western Union Tel. Co., 154 U. S. 1, 14 (1894) (dictum) (embezzlement); 2 J. BISHOP, *supra* note 68, § 325, at 186-87 (embezzlement); 2 W. RUSSELL, *supra* note 68, at 1048-82 (larceny by trick); *id.* at 1277-83 (embezzlement); *id.* at 1421-23 (forgery); 2 F. WHARTON, WHARTON'S CRIMINAL LAW § 915, at 1219-20 (12th ed. J. Ruppenthal 1932) (forgery); text and notes at notes 76-80 *infra* (false pretenses). Because forgery was an inchoate crime, it was not necessary that the forger *succeed* in obtaining something of value. *See* 2 J. BISHOP, *supra* note 69, § 524, at 301-02.

71. *See, e.g.*, MASS. GEN. STAT. ch. 161, § 54 (1860) ("Whoever designedly, by a false pretense . . . with intent to defraud, obtains from another person any property"); MO. REV. STAT. ch. 36, § 4565 (1909) ("Every person who . . . shall designedly . . . by any . . . false pretense . . . obtain from any person any money, personal property . . . or other valuable thing"); N. Y. REV. STAT. pt. 4, ch. 1, tit. 3, § 58 (1875) ("Every person who, with intent to cheat or defraud another, shall designedly . . . by any . . . false pretense . . . obtain from any person any money, personal property, or valuable thing"). *See also* 30 Geo. 2, ch. 24 § 1 (1757) (the original English false pretense statute, which is part of the common law in some American jurisdictions) ("all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, good, wares, or merchandizes, with

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addition, the Supreme Court,[72] other courts,[73] and commentators[74] have treated the mail fraud statute as one proscribing the fraud of false pretenses. This narrower construction is consistent with the maxim that criminal statutes should be narrowly construed and saves the statute from a possible constitutional attack on vagueness grounds.[75]

During the period of enactment and critical amendment of the mail fraud statute, it was impossible to obtain a conviction

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intent to cheat or defraud any person or persons of the same . . . shall be . . . fined and imprisoned").

72. *See* Durland v. United States, 161 U. S. 306 (1896) (implicitly treating the mail fraud statute as a false-pretenses statute).

73. *See, e.g.*, People v. Ashley, 42 Cal. 2d 246, 261 n. 3, 267 P. 2d 271, 281 n. 3 (1954) (Traynor, J.) (using the U. S. Supreme Court's construction of the mail fraud statute in *Durland* as an aid in construing the California false-pretenses statute).

74. *See, e.g.*, F. INBAU, J. THOMPSON & A. MOENSSENS, CASES AND COMMENTS ON CRIMINAL LAW 595-600 (1973) (mail fraud statute is presented in same section as false pretenses); W. LAFAVE & A. SCOTT, *supra* note 64, § 90, at 671 (1972) (the mail fraud statute presented as a crime related to false pretenses); R. PERKINS, *supra* note 63, at 297 n. 6; Pearce, *supra* note 58, at 979.

75. For instance, if the statute is not limited by any common-law fraud principles, thus proscribing all conduct considered contrary to public policy and morals by the courts, *see Mandel*, 591 F. 2d at 1360-61, it might be struck down as unconstitutional. In United States v. L. Cohen Grocery Co., 255 U. S. 81 (1921), the Supreme Court struck down a federal criminal statute on void-for-vagueness grounds. This action, however, was exceptional because the Court has seldom struck down a *federal* statute as unconstitutional for vagueness. *See* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 104 U. PA. L. REV. 67, 83 n.80 (1960). "[The] Court has consistently favored that interpretation of legislation which supports its constitutionality. . . . Only if no construction can save the Act [in question] from [the] claim of unconstitutionality are we willing to reach that result." Screws v. United States, 325 U. S. 91, 98, 100 (1945).

for false pretenses unless the defendant had directly received something of economic value from the victim of the supposed fraudulent scheme. Moreover, those decisions permitting convictions for fraud although the victim has suffered no economic loss were not inconsistent with the general requirement that the victim transfer something of economic value to the defendant.

1. *The American Decisions Regarding Statutes Proscribing the Fraud of False Pretenses.* In 1907, in the decision of *In re Waterman,*[76] the Supreme Court of Nevada enunciated what had been an accepted principle of law for at least the preceding half century: "The obtaining and possession of something of value is an essential ingredient of the crime of obtaining money, goods or other property, under false pretenses, and where this essential ingredient is lacking, there is no crime."[77] *Waterman* involved a habeas corpus proceeding in which a man held in custody by Nevada authorities challenged the sufficiency of his indictment for false pretenses in Iowa, whose officials were seeking his extradition. The Nevada court carefully analyzed the formal indictment against Waterman, comparing it with the requirement of the Iowa false-pretenses statute.[78] The court found the indictment "fatally defective" because it failed to allege that Waterman had received anything of value from the

76. 29 Nev. 288, 89 P. 291 (1907).

77. *Id.* at 299, 89 P. at 295 (citing Jamison v. State, 37 Ark. 445 (1881)). *Accord,* Connor v. State, 29 Fla. 445, 10 So. 891 (1892); State v. Clark, 72 Iowa 30, 33 N. W. 340 (1887); State v. McGinnis, 71 Iowa 685, 33 N. W. 338 (1887); State v. Anderson, 47 Iowa 142 (1877); State v. Lewis, 26 Kan. 123 (1881); Bracey v. State, 64 Miss. 26, 8 So. 165 (1886); Willis v. People, 26 N. Y. Sup. Ct. 84 (App. Div. 1879).

78. IOWA CODE ANN. § 5041 (West 1897) ("If any person designedly and by false pretense, . . . with intent to defraud, obtain from another any money, goods or other property, . . . he shall be imprisoned . . . or . . . fined"), *quoted in* In Re Waterman, 26 Nev. 288, 297-98, 89 P. 291, 294-95 (1907).

victim in connection with the alleged scheme to defraud, and accordingly granted the writ.[79]

Commonwealth v. *Harkins*[80] illustrates the extent to which courts went in preserving the requirement that the defendant obtain some tangible thing of value. The defendant, by falsely asserting that he had sustained personal injuries for which the victim of the deception bore responsibility, obtained a consent judgment against the victims. The court ruled that the judgment could not serve as the basis for a conviction for false pretenses because the defendant had received money only after the order had been entered. The entry of the order marked the termination of the scheme and payment afterwards under the order was entirely lawful.[81]

Some nineteenth-century courts permitted convictions for false pretenses although the victim suffered no economic loss. These decisions, however, are not inconsistent with the requirement that the victim transfer something of economic value to the defendant. In *LaMoyne* v. *State*,[82] The Texas Court of Criminal Appeals affirmed the conviction of a farmer who had been accused of swindling[83] a merchant of certain machinery. The farmer had obtained the machinery on credit by granting the merchant a mortgage on his crops and farm—a transaction to which the merchant agreed only after the farmer falsely represented that there were no liens on his property. Since the farmer had retained sufficient equity in the property to secure fully his debt to the merchant, the merchant was able to recover the machinery and sell it without any apparent loss. The court found that the lack of any economic loss to the merchant would not

79. 29 Nev. at 298-300, 89 P. at 295.

80. 128 Mass. 79 (1880).

81. *Id.* at 82-83. Such payment was in fact a legal obligation.

82. 53 Tex. Crim. 221, 111 S. W. 950 (Crim. App. 1908).

83. The crime of false pretenses is known as "swindling" in Texas. *See* W. LaFave & A. Scott, *supra* note 64, § 90, at 655 n. 2.

serve as a defense to swindling.[84] Rather the court found that the crime is determined by "the value of the property the possession of which is so fraudulently acquired."[85]

People v. *Bryant*[86] was a similar case. The defendant had sold to the victim a promissory note secured by a mortgage, but only after the defendant had falsely represented that the land covered by the mortgage was "good, tillable land, of good soil and of great value."[87] The accused argued in his defense that since the mortgage served only to secure the note, and since it had not been shown that the maker of the note would not fulfill his obligation, the "indictment fail[ed] to show that [the victim had] been defrauded of any of her property."[88] The California Supreme Court held, however, that "[i]f a person is induced to part with his property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of the property so parted with, even though he may eventually make himself whole in some mode not then contemplated."[89]

LaMoyne and *Bryant* thus stand for the proposition that a conviction for the fraud of false pretenses can be sustained even when the victim has suffered no economic loss.[90] The cases

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84. 53 Tex. Crim. at 224, 111 S. W. at 950. In denying a motion for rehearing, the court explicitly overruled three of its own previous decisions holding that lack of economic loss was a defense to the crime. *Id.* at 225-30, 111 S. W. at 951-54.

85. *Id.* at 229, 111 S. W. at 953. The defendant had been convicted of misdemeanor swindling—a crime limited to amounts under $50. In dictum, the appellate court noted that he should have been charged with felony swindling, since the value of the farm machinery obtained was in excess of $50. *Id.* at 224, 111 S. W. at 450.

86. 119 Cal. 595, 51 P. 960 (1898).

87. *Id.* at 596, 51 P. at 960.

88. *Id.* at 597, 51 P. at 961.

89. *Id.*

90. For cases addressing the relevance of economic loss, see, for example, Commonwealth v. Ferguson, 135 Ky. 32, 121 S. W. 967

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do not signal, however, a departure from the requirement that something of economic value be obtained from the victim. In *LaMoyne*, the defendant acquired farm machinery from the victim, and in *Bryant*, the money paid for the promissory note.

2. *The English Case Law.* In construing the English false-pretenses statute,[91] the English courts have consistently required that the defendant receive something of economic value from the victim.[92] For example in *Rex* v. *Wavell*,[93] the court held that the defendant could not be convicted for a scheme in which he acquired credit from a bank. Although the defendant's creditors had benefited from the transaction the defendant had not received any money, chattel, or other item of value. The court

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(1909); State v. Miller, 212 Mo. 73, 111 S. W. 18 (1908) (dictum); People v. Cook, 48 N. Y. Sup. Ct. 67 (App. Div. 1886). *See also* cases cited in Annot., 53 A. L. R. 2d 1215 (1957).

91. The false-pretenses statute construed by the cases considered here reads, in part: "[I]f any Person shall by any false Pretence obtain from any other Person any Chattel, Money, or valuable Security, with Intent to cheat or defraud any Person of the same, every such Offender . . . shall be liable . . . to be transported beyond the Seas for the Term of Seven Years." 7 & 8 Geo. 4, c. 29, § 53 (1827).

92. In a decision under a forgery statute, Welham v. Director of Public Prosecutions, [1961] A. C. 103, the House of Lords faced a problem of statutory interpretation similar to the one in this inquiry. In construing the Forgery Act of 1913, 3 & 4 Geo. 5, c. 27, the Lords were called upon to decide whether the substance of defrauding consists of mere deceit, or deceit with the intent to cause economic loss. The question was resolved by finding that the concept of fraud had not been confined to the causing of economic loss since at least the mid-nineteenth century. *Id.* at 124 (Lord Radcliffe), 131 (Lord Denning). But their decision had no impact on the line of cases requiring the acquisition of something of value from the victim, for the issue before the House was not framed in terms of this quite separate question.

93. 1 Mood. 224, 168 Eng. Rep. 1249 (K. B. 1829).

ruled that the extension of credit alone did not, therefore, fall within the ambit of the statute.[94]

In *Regina* v. *Eagleton*,[95] the defendant received a credit on account for goods he knew to be defective. In affirming the conviction for *attempting* to obtain money under false pretenses, the court noted that the defendant had not yet received actual payment, and thus could not be convicted of the crime of *obtaining* something under false pretenses.[96] He, too, had received nothing of value from his victim.

Thus, the legislative history of the statute and the contemporaneous understanding of fraud indicate that the scheme or artifice to defraud is a scheme or artifice to trick the victim into transferring something of economic value to the defendant. When corrupt politicians deprive citizens of their intangible

94. *Id.* at 230, 168 Eng. Rep. at 1252. Regina v. Garrett, 1 Dears. C. C. 232, 169 Eng. Rep. 707 (K. B. 1853), is another case in which the statute was strictly construed. The defendant, an international traveler, received money on a forged letter of credit from the branch of a British financial firm in Russia, and this firm in turn sought reimbursement from another bank in London on the basis of the second bank's obligations under the letter of credit. The defendant was convicted of false pretenses for defrauding the second bank in London. Lord Campbell did not, however, allow the conviction to stand, since the defendant received nothing from the second bank. The false pretense was made to the second bank, but the money was received from the first bank. "A gross fraud has been committed, but not an obtaining money under false pretences within the statute." *Id.* at 241, 169 Eng. Rep. at 711. The prosecution of the defendant in this case resembles prosecutions for political corruption based on the intangible-rights theory in that an unlawful acquisition of money from one firm or person was used in an attempt to secure a conviction for defrauding a second firm or person, from whom no money was directly received. Lord Campbell did in fact condemn the original underlying conduct of the defendant in this case, but he clearly distinguished it from conduct that was within the reach of the statute.

95. 1 Dears. C. C. 515, 169 Eng. Rep. 826 (Q. B. 1855).

96. *Id.* at 537-38, 169 Eng. Rep. at 835-36.

rights to honest government, there may be deception, but there is no transfer of anything of economic value[97] from the citizens to the politician. The meaning of fraud at the time the mail fraud statute was enacted and initially amended does not, therefore, support the intangible-rights theory.

III. Support for the Intangible-Rights Doctrine in Prior Federal Case Law

Although the legislative history of the statute and the contemporaneous understanding of "fraud" fail to support the intangible-rights doctrine, decisions of the Supreme Court and of several courts of appeals have been cited as support for the doctrine. These cases have, however, been misapplied when offered as authority for the doctrine.

A. Supreme Court Decisions

Although the Supreme Court has not dealt directly with the intangible-rights doctrine,[98] two Supreme Court decisions construing section 1341, *Durland* v. *United States*[99] and *Badder* v. *United States*,[100] and Supreme Court cases analyzing fraud in federal statutes other than section 1341, have been cited as support for the intangible-rights doctrine.[101]

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97. In Carey v. Piphus, 435 U. S. 247 (1978), the Supreme Court, in an action for damages under section 42 of Title 42, held that constitutionally guaranteed civil rights have no intrinsic economic value. *Id.* at 254-55.

98. The only section 1341 political-corruption case to reach the Supreme Court is Parr v. United States, 363 U. S. 370 (1960). The defendant in *Parr* was acquitted because of the prosecution's failure properly to demonstrate use of the mails, and the Court did not address the validity of the intangible-rights doctrine. *Id.* at 393-94.

99. 161 U. S. 306 (1896).

100. 240 U. S. 391 (1916).

101. *See* text and notes at notes *infra.*

1. Durland v. United States. As discussed above, the principal issue in *Durland* was whether the common-law defense of false promises might prevent a conviction under the mail fraud statute.[102] Under the majority rule at common law during the nineteenth century, a conviction for false pretenses could not be obtained on the basis of a false promise; a false representation had to refer to an existing or past fact to provide the basis for a conviction.[103] The Supreme Court held that this defense was not available in prosecutions under the mail fraud statute: "The statute is broader than is claimed. Its letter shows this: 'Any scheme or artifice to defraud.' Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud."[104]

The *Durland* Court's reference to the breadth of the statute has led some lower courts to interpret *Durland* as eliminating *all* common-law principles of fraud in connection with section 1341.[105] In so doing, these courts apparently disregard the fact

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102. *See* text and notes at notes *supra*. The defendant in *Durland* had devised a scheme to inveigle persons to "invest" in certain bonds which he promised would mature in extraordinarily short periods of time, producing very handsome profits for the putative "investors." The defendant's intention was to take all the money realized in the scheme for himself, paying nothing to the victims. Counsel for the defendant argued that his conviction for mail fraud could not stand, primarily on the ground that the defendant had made no representation as to existing fact but only a false promise about the future. 161 U. S. at 312-14.

103. *See, e.g.*, Commonwealth v. Drew, 36 Mass. (19 Pick) 179 (1837); Rex v. Goodhall, Russ & R. 461, 168 Eng. Rep. 898 (K. B. 1821); F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 543 (Philadelphia 1846).

104. 161 U. S. at 313.

105. *See, e.g.*, United States v. Mandel, 591 F. 2d at 1361; United States v. States, 488 F. 2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974). *But see* United States v. Rowe, 56 F. 2d 747, 749 (2d Cir.), *cert. denied*, 286 U. S. 554 (1932) (L.

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that *Durland* eliminated a single common-law defense. The Court did not hold that all common-law principles of fraud were inapplicable to section 1343.[106] Indeed, the Court was faced with no issue having a direct bearing on the intangible-rights doctrine.[107] Both after its ruling in the case and after the congressional codification of the ruling, the transfer of money or property was required in prosecutions under the statute.[108]

2. Badders v. United States. *Badders*[109] has been cited as support for a very broad reading of the statute in the political-corruption cases.[110] In *United States* v. *Mandel,* for example,

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(Footnote continued from preceding page.)
Hand, J.) (*Durland* limited to removal of the false-promises defense only). In Parr v. United States, 363 U. S. 370 (1960), *discussed in* note 98 *supra,* Justice Frankfurter, in dissent, interpreted *Durland* as eliminating all common-law defenses. 363 U. S. at 400-01.

106. In United States v. McNeive, 536 F. 2d 1245, 1247 n. 3 (8th Cir. 1976), the Eighth Circuit considered *Durland* relevant to the intangible-rights theory because *Durland* recognized that the definition of fraud in the mail fraud statute was intended by Congress to be broader than the definition of fraud recognized at common law. Such reasoning, however, equates the removal of one common-law restriction with all common law restrictions.

107. The Court did decide a subsidiary issue involving the mailing requirement. 161 U. S. at 314-15. In the course of resolving this issue, the Court stated in dictum that "[i]t is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the post office letters, which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor." *Id.* at 315. The reference of the court here was to the fact that the defendant's actions involved an attempted fraud. *Id.* at 309, 310. Despite its lack of success, there is no doubt that the fraudulent scheme of the case involved the obtaining of money.

108. *See* text and notes at notes *supra.*

109. Badders v. United States, 240 U. S. 391 (1916).

110. *E.g.,* United States v. Mandel, 591 F. 2d at 1360; United States v. States, 488 F. 2d 761, 767 (8th Cir. 1973), *cert. denied,* 417 U. S. 909 (1974).

the Fourth Circuit quoted *Badders* dictum to support the proposition that section 1341 prohibits all forms of deception contrary to "accepted moral standards and notions of honesty and fair play."[111] Although the Supreme Court stated that section 1341's jurisdiction over misconduct accomplished through the *mails* provided a basis for Congress to proscribe anything contrary to public policy, the Court in *Badders* did not hold that Congress had done so.[112] The issue in that case was the constitutional question whether congressional power to regulate the mails necessarily included the power to punish certain conduct as criminal. The Court did not construe the concept of fraud in section 1341 broadly; rather, it construed broadly the constitutional power of Congress. Properly understood, the *Badders* dictum provides no support for the intangible-rights doctrine.

3. *Supreme Court Interpretations of Fraud in Other Federal Statutes.* The other Supreme Court cases cited by the lower federal courts as support for the intangible-rights doctrine concern the meaning of fraud in various federal statutes. In intangible-rights cases under section 1341, the issue is whether a conviction is possible without the transfer of valuable property. In the cited cases, however, there had either been such a transfer or the conviction was not sustained.

The court in *United States* v. *Isaacs* cited Supreme Court cases decided under two other federal statutes to support the intangible-rights doctrine. *United States* v. *Barnow*[113] involved a prosecution under a statute making it a federal crime falsely to "assume or pretend to be an officer or employee . . . of the United States . . . [and] in such pretended character demand or obtain from any person . . . any money, paper, document, or other valuable thing," with intent to defraud.[114] The victims

111. 591 F. 2d at 1360.

112. Badders v. United States, 240 U. S. 391, 393 (1916).

113. 239 U. S. 74 (1915).

114. Act of Mar. 4, 1909, ch. 321, § 32, 35 Stat. 1088 (current version at 18 U. S. C. § 912 (1976)).

had transferred money to the defendant, but sustained no economic loss.[115] The Court ruled that economic loss was unnecessary for conviction. This case—like *LaMoyne*[116] and *Bryant*[117] —is, however, only another illustration of the common-law principle that the victim need not suffer economic loss provided that the defendant has received something of economic value from the victim.

The Seventh Circuit, in *Isaacs,* cited two other Supreme Court cases as support for the intangible-rights theory: *Hass* v. *Henkel,*[118] and *Hammerschmidt* v. *United States.*[119] Each of these cases was decided under a predecessor to section 371 of Title 18, which proscribes any conspiracy "to defraud the United States . . . in any manner or for any purpose."[120]

In *Haas,* the Court upheld an indictment charging the prisoner, who was seeking habeus corpus relief, with defrauding the government.[121] The Court noted that the statute reached conspiracies "to defraud the United States by depriving it of its lawful right . . . or promulgating or diffusing . . . information . . . officially acquired."[122] The Court added, however, that "it is not essential to charge or prove an actual financial or property loss to make a case under the statute."[123] The statement is merely a repetition of the common-law rule that pecuni-

115. 239 U. S. at 75.

116. *See* text and notes at notes 82-85 *supra.*

117. *See* text and notes at notes 86-89 *supra.*

118. 216 U. S. 462 (1910).

119. 265 U. S. 182 (1924.

120. Rev. Stat. § 5440 (1878) (current version at 18 U. S. C. § 371 (1976)). Since the crime was defined to include conspiracy, inchoate fraud could be punished under this provision.

121. 216 U. S. 462, 479-80 (1910).

122. *Id.*

123. *Id.* at 480.

ary loss by the victim is unnecessary provided that the requirements of fraud have been met.[124]

The *Isaacs* court relied on the Supreme Court decision of *Hammerschmidt* v. *United States* by quoting the following passage: "It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention."[125] The Seventh Circuit did not explain how this statement supports the intangible-rights doctrine.[126] The first clause of the quoted sentence merely repeats the common-law principles that the victim of a fraud need not suffer economic loss.

The second clause of the quoted statement arguably supports the intangible-rights doctrine. The Court perhaps used the words, "but only that its legitimate official action and purpose shall be defeated by," to indicate that a transfer of something of economic value is unnecessary whenever the interference with official government action has resulted in a deprivation of rights. Such an argument is, however, untenable. There are two elements to fraud: deception, and the transfer of an item of eco-

124. The cases the *Haas* Court cited also provide no support for the intangible-right doctrine. Both cases were decided under the predecessor to Section 371 of Title 18. Hyde v. Shine, 199 U. S. 62 (1905), dealt with a purported scheme to defraud the government in a transaction concerning public lands. This case, like *Haas,* held that the victim of a fraudulent scheme need sustain no economic loss. *Id.* at 81-82. It is, moreover, clear that the defendants in *Hyde* received something of value—public lands. *Id.* at 83. United States v. Keitel, 211 U. S. 370 (1908) involved a scheme to defraud the government of title to certain coal lands. Again the Court found the lack-of-economic-loss argument to be unpersuasive, and ruled against the defendant. *Id.* at 393-94.

125. United States v. Isaacs, 493 F. 2d 1124, 1150 (7th Cir. 1974), *cert. denied,* 417 U. S. 976 (1974).

126. *Id.*

nomic value.[127] The question before the Court, noted Chief Justice Taft, was "whether deceit or trickery was essential to satisfy the defrauding required under the statute,"[128] and it was to that question that the quoted statement was undoubtedly addressed. Indeed, the concluding words of the second clause specify that the statute required only that official action be defeated by "misrepresentation, chicane or overreaching"—language plainly discussing the deception requirement.[129]

Thus, the Supreme Court cases cited by the Seventh Circuit in *Isaacs* either fail to support or undercut the intangible-rights doctrine. Other courts, however, have attempted to support the doctrine with Supreme Court precedent. In *United States* v. *States*,[130] for instance, the federal district court cited two Supreme Court decisions for the proposition that the intangible rights of citizens to representative government have economic value and that "[u]nder our form of government . . . it could

127. 2 J. STEPHEN, *supra* note 68, at 121-22; Fridman, *supra* note 68, at 537-38.

128. Hammerschmidt v. United States, 265 U. S. 182, 187 (1924).

129. *See id.* at 185-87.

The *Hammerschmidt* Court cited several of its prior decisions in the opinion, and—like *Hammerschmidt* itself—none of these cases provide support for the intangible-rights theory. *See* United States v. Barnow, 239 U. S. 74 (1915); United States v. Foster, 233 U. S. 515 (1914); United States v. Plyler, 222 U. S. 15 (1911); Haas v. Henkel, 216 U. S. 462 (1910), *discussed in* text and notes at notes 129-132 *supra*. In *Foster*, brought under the Act of Mar. 4, 1909, ch. 321, § 37, 35 Stat. 1096 (current version at 18 U. S. C. § 371 (1976)), the Court found that although the government might well have suffered no economic loss in the fraudulent transaction, there were grounds for charging the defendant with criminal conduct. 233 U. S. at 525-26. The defendant postmaster meant to obtain a thing of value through his conspiratorial action: an increase in his salary. *Id.* at 519-20.

130. 362 F. Supp. 1293, *aff'd*, 488 F. 2d 761 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974).

hardly be contended that the right to have one's vote counted, undiluted by fraudulent absentee ballots, is without value."[131]

The *States* court relied on *United States* v. *Saylor*[132] and *United States* v. *Classic*.[133] Both cases involved federal prosecutions for interference with the conduct of elections, and were brought under a Reconstruction Era civil rights statute making it a criminal offense for "two or more persons [to] conspire to injure . . . any citizen in the free exercise or enjoyment of any right . . . secured to him by the Constitution or laws of the United States."[134] The issue in both cases was whether the statute could be construed to prohibit certain specific kinds of election irregularities, in a context in which citizens' voting rights were acknowledged to be constitutionally protected.[135] The cases do not support the proposition that intangible civil rights have economic value[136]—a proposition of dubious validity today[137] and undoubtedly beyond the intentions of Congress in 1872, when the mail fraud statute was first enacted. The

131. *Id.* at 1296.

132. 322 U. S. 385 (1944).

133. 313 U. S. 299 (1941).

134. 18 U. S. C. § 241 (1976). *Classic* also involved the predecessor to 18 U. S. C. § 242 (1976). The district court decision in United States v. Classic, 35 F. Supp. 457 (E. D. La. 1940), did contain a ruling that the defendants might be prosecuted under the mail fraud statute for their role in voting irregularities, but this issue was not preserved for decision by the Supreme Court.

135. United States v. Classic, 313 U. S. 299, 307-29 (1941); United States v. Saylor, 322 U. S. 385, 387-88 (1944). Justice Douglas, dissenting in *Saylor,* focused especially on the issue of federalism. *Id.* at 390-393 (Douglas, J., dissenting).

136. *Cf.* United States v. Gradwell, 243 U. S. 476, 481, 485 (1917) (a conspiracy to bribe electors does not constitute a fraud upon the United States) (decided under Act of Mar. 4, 1909, ch. 321, § 37, 35 Stat. 1096 (current version at 18 U. S. C. § 371 (1976))).

137. *See* text and note at note 97 *supra.*

presentation of Supreme Court authority by the lower courts has been inapposite because these courts have ignored the explicit requirements for a finding of fraud. The central requirement—the transfer of something of economic value—has not been discarded by prior Supreme Court decisions.

B. Decisions of the Lower Federal Courts

The courts that have adopted the intangible-rights doctrine have relied[138] on the earlier decisions of two lower courts: *Shushan* v. *United States,*[139] decided by the Fifth Circuit in 1941, and *United States* v. *Procter & Gamble Co.,*[140] decided by a district court in 1942. Careful analysis of these cases reveals, however, that although the defendants were charged with participation in schemes involving the breach of certain rights and duties, they also derived direct financial benefit from the victims of their frauds. These cases do not provide authority for the intagible-rights theory, under which there is no requirement that the defendant receive something of economic value from the victims of the fraud.[141]

In *Shushan,* the codefendants sought to obtain by fraud money from the parish fisc. Abraham Shushan, who had previously served on the Orleans Parish Levee Board,[142] conspired with a current Board member and three others in a scheme by which they obtained money deceptively from the Board through a plan to refund outstanding issues of its bonds. The defendants

138. *See, e.g.,* United States v. Mandel, 591 F. 2d at 1362; United States v. Isaacs, 493 F. 2d 1124, 1149-50 (7th Cir.), *cert. denied,* 417 U. S. 976 (1974); United States v. States, 488 F. 2d 761, 766 (8th Cir. 1973), *cert. denied,* 417 U. S. 909 (1974).

139. 117 F. 2d 110 (5th Cir. 1941), *cert. denied,* 313 U. S. 574 (1942).

140. 47 F. Supp. 676 (D. Mass. 1942).

141. *See* text and notes at notes *supra.*

142. He had been appointed by the late Governor and U. S. Senator Huey Long. T. H. WILLIAMS, HUEY LONG 421 (1969).

charged an exorbitant fee for the refunding service subsequently rendered; the fee was divided among the defendants according to a prearranged formula.[143] The Fifth Circuit noted that "all [of the defendants' conduct] was done and intended to obtain sums of money from the Board and taxpayers to be converted to [the defendants' own] use."[144] This aspect of *Shushan* plainly provides no support for the intangible-rights doctrine.

Another part of the *Shushan* opinion—concerned with demonstrating the requisite element of deception—has, however, been cited as support for the intangible-rights doctrine. To strengthen its contention that the convictions did not rest solely on false representations or lies about the nature of the funding scheme, the court invoked a theory of fraud predicated on the breach of fiduciary duty.[145] The one defendant sitting on the Board was bribed by the other defendants to persuade the Board to agree to the refunding scheme. The defendant Board member did so without revealing his own private interest in the matter. These actions by all the defendants resulted in a breach of their fiduciary duty to the Board and to the public. As the court stated, "No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one [*sic*] must in the federal law be considered a scheme to defraud."[146] Separating the words from their context, the statement might seem to support the intangible-rights doctrine; accordingly, some courts have cited *Shushan* in support of the doctrine.[147] The context, however, demonstrates that

143. 117 F. 2d at 114-15.

144. *Id.* at 115.

145. *Id.*

146. *Id.*

147. *See, e.g.*, United States v. States, 488 F. 2d 761, 767 (8th Cir. 1973) ("In *Shushan* there is the implication that a scheme to gain personal favors from public officials is a scheme to defraud the public, although the interest lost by the public can be described no

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the court was not addressing the question whether the defendants gained in the scheme; the court had already concluded that the economic requirement had been met.[148] Rather, the court was establishing the proposition that breach of fiduciary duty is a kind of deception, and that when such a breach accounts for the acquisition of money—as it did here—the defendants have committed fraud.

United States v. *Procter & Gamble Co.*[149] involved a prosecution under section 1341 in a nonpolitical setting. The corporate defendant had bribed employees of a competitor to obtain certain trade secrets of the competitor. The court explicitly rejected the defendant's contention that the proprietary information it illicitly obtained lacked monetary value.[150] Like the Fifth Circuit in *Shushan,* the court went on to consider whether the defendant had used deception, and, as in *Shushan,* the court's theory involved breach of fiduciary duty: "When one tampers with that relationship [between employer and employee] for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right."[151] Although *Procter* has been cited as support for the intangible rights doctrine by many of the recent political-corruption cases[152] and by

(Footnote continued from preceding page.)
more concretely than an intangible right to the proper and honest administration of government."), *cert. denied,* 417 U. S. 909 (1974). *Accord,* United States v. Keane, 522 F. 2d 534, 546 (7th Cir. 1975); United States v. Isaacs, 493 F. 2d 1124, 1150 (7th Cir.), *cert. denied,* 417 U. S. 976 (1974).

148. Only a few lines earlier, the court noted that "[a] scheme to get *money* unfairly by obtaining and then betraying the confidence of another . . . would be a scheme to defraud though no lies were told." 117 F. 2d at (emphasis added).

149. 47 F. Supp. 676 (D. Mass. 1942).

150. *Id.* at 679.

151. *Id.* at 678.

152. *See, e.g.,* United States v. States, 488 F. 2d 761, 766 (8th Cir. 1973), *cert. denied,* 417 U. S. 909 (1974); United States v.

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two recent Seventh Circuit cases adopting the doctrine in a corporate context,[153] the *Procter & Gamble* court did not embrace any theory of intangible rights. Rather, the court held that something of economic value—proprietary information—had been taken from the defendant.

Procter & Gamble and *Shushan* establish no more than that under some circumstances a breach of fiduciary duty amounts to the deception necessary for fraud. These early cases, to which the origin of the intangible-rights theory seems to have been traced by later courts, actually left the economic requirement of fraud intact.

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Mandel, 415 F. Supp. 997, 1012 (D. Md. 1976), *rev'd on other grounds,* 591 F. 2d 1347 (4th Cir.), *aff'd in relevant part* en banc, 602 F. 2d 653 (4th Cir. 1979) (per curiam), *cert. denied,* 48 U. S. L. W. 3662 (U. S. Apr. 14, 1980) (Nos. 79-1029, 79-1030).

153. United States v. Bryza, 522 F. 2d 414 (7th Cir. 1975); United States v. George, 477 F. 2d 508 (7th Cir.), *cert. denied,* 414 U. S. 827 (1974). Both *George* and *Bryza* involved schemes in which a corporate purchasing agent received payments in connection with secret agreements with his employer's suppliers. The facts in each case do not clearly indicate whether there was a direct causal relationship between the defendant's receipt of the payments and his deception of the corporate victim—that is, whether the defendant received payment directly from corporate funds. The *George* court found this issue of causation irrelevant to its holding, *id.* at 512. Both courts, however, based their affirmation of the convictions squarely upon the intangible-rights doctrine, which was characterized as the deprivation from an employer of its employee's "loyal and honest services." *Id. See Bryza,* 522 F. 2d at 422. Possibly the best interpretation of *George* and *Bryza* is that the Seventh Circuit simply used the intangible-rights doctrine to avoid the difficult problem of establishing, from complex and ambiguous facts, that the defendants had received direct economic benefit from the corporate victims of their deceptive schemes. To the extent that the court bottomed such an approach on *Procter & Gamble,* it was without genuine authority for its holdings.

Conclusion

By invoking a theory of intangible political rights, several federal courts have attempted to convert the federal mail fraud statute—section 1341—into a weapon for fighting political corruption when the citizenry has not been deprived of anything of economic value. The mere deprivation of the right to honest government, according to the intangible-rights theory, constitutes fraud for purposes of section 1341.

Analysis of the legislative history of section 1341, however, demonstrates that the section's reach should be limited to fraudulent conduct that results in the acquisition of money or property from the victim. The meaning of fraud in the nineteenth century, when the mail fraud statute was originally adopted, provides further support for such a reading. Moreover, the Supreme Court and lower federal court decisions that have been cited for an intangible-rights construction of section 1341 do not provide support. The use of section 1341 against politically corrupt politicians thus remains contrary to Congress's original intent. Until Congress amends section 1341, the continued use of the section to prosecute corrupt politicians on a theory of intangible political rights should not be permitted by the courts.

W. Robert Gray